



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

1645
A TREATISE

ON

REAL PROPERTY TRIALS.

SHOWING THE DIFFERENCE BETWEEN THE OLD ACTION OF EJECTMENT
AND THE ACTION TO RECOVER REAL PROPERTY,—EMBRACING THE
PROCEDURE, THE PRINCIPLES OF LAW, AND THE RULES OF EVIDENCE
WHICH PREVAIL IN REAL PROPERTY CAUSES, BOTH
IN LAW AND EQUITY,—AND THE NATURE AND MODE OF
ENFORCING TRUSTS (EITHER EXPRESS OR BY IMPLICATION)
WITH WHICH REAL PROPERTY MAY BE CHARGED.

INCLUDING THE DOCTRINE OF THE WIFE'S SEPARATE ESTATE IN LANDS,
AND THE RIGHTS, INCIDENTS, AND LIABILITIES OF THE SAME; AND
HER GENERAL RIGHTS TO REAL ESTATE UNDER RECENT LEGISLATION
OF THE SEVERAL STATES,—THE WIDOW'S DOWER; AND
A REFERENCE TO THE LEGISLATIVE CHANGES ON THIS
QUESTION,—STATUTORY LIENS; THEIR EFFECT, NATURE
AND INCIDENTS.

BY

WM. HENRY MALONE,
ASHEVILLE, NORTH CAROLINA.

WASHINGTON, D. C.:
W. H. MORRISON.
1883.

Entered, according to Act of Congress, in the year 1881,
By WM. HENRY MALONE,
In the office of the Librarian of Congress, at Washington, D. C.

SHERMAN & CO., PRINTERS,
PHILADELPHIA.

TO
THE HONORABLE ROBERT BRANK VANCE,
(REPRESENTATIVE IN CONGRESS FROM THE 8TH DISTRICT OF
NORTH CAROLINA),

Who, by the voice of his people, has been promoted to such a high political position for many years, and while assiduously acting in the routine of official conduct, has ever maintained the enviable reputation of an HONEST, CHRISTIAN GENTLEMAN,—never forgetting his duties to HOME, CHURCH, or PEOPLE,—always mindful of the fact that OTHERS might be in NEED and entitled to SYMPATHY and HELP, and of whom it may be said, that, in all the relations of life, he has AT ALL TIMES BEEN FOUND AT THE POST OF DUTY. Such attributes of character have called forth this dedication by the

AUTHOR.

P R E F A C E.

THE rapid increase of population, the growing tendency to a subdivision of vast boundaries of land into smaller farms, and the wonderful enhancement in value of landed estates, make all questions affecting, or in anywise appertaining to, this class of property, of transcendant importance at the present time; while increasing wealth, progress, and improvement stimulate inquiry into our land-titles,—the modes by which they may be acquired or lost.

The legal practitioner is confronted daily with questions relative to real estate, a proper and satisfactory solution of which requires no little amount of studious labor and learning. To constitute a lawyer a safe *legal* adviser, he must first acquire a thorough knowledge of the *science* of the law. In his professional consultation, the lawyer is inclined, almost intuitively, to ask himself the question, what is the *law* of the case,—what would be the result of a *trial* under the proper issues involving the questions propounded by his client? If the client should be the claimant of land, the possession of which has been usurped by another without *right*, it is necessary that he should understand the doctrine of ejectment, or the action to recover land, in which is involved the numerous questions arising out of the subjects of grants, deeds, boundaries, limitations, lappage, color of title, estoppel, notice, execution and judicial sales, presumptions of law, pleading, evidence, etc. The client may wish to invoke the equitable jurisdiction of the court to enforce a trust, obtain relief on account of fraud, or to determine the rights and liabilities of the wife in her separate estate, and other questions of a kindred character. If so, the principles of equitable jurisprudence must be understood. Both in the office of consultation and on the *trial*, questions, numerous, intricate, and far-reaching in

their effect, are presented daily, so that the lawyer must be "armed and equipped" for these professional battles.

The great secret of success at the bar is a thorough preparation for *trial*. The lawyer who comes to the trial of a cause, and *then* has to prepare his case, need not be disappointed if, in the future, the client employs another of more studious and business habits.

Upon each of the subjects herein indicated volumes have been written, the purchase and examination of which require vast expense and labor. It occurred to the author, many years ago, that, as real property controversies in this country constitute such a vast and important part of the business of the courts, both of law and equity, that a work of an elementary character, confined to this species of property alone, in which all the practical, leading questions were *condensed into smaller space*, would be of incalculable benefit to both bar and bench. The result, as it seemed, would be to concentrate the professional mind upon the more universally applied rules of law and practice, ignoring, to some extent, all that has been abrogated, become obsolete and unnecessary, except as a matter of historical, judicial learning. As these chief foundation principles have been applied and illustrated by the courts of highest and last resort in the several States in the United States, and of England, it seemed highly important to have these adjudications collated, with extended annotations of the same, thereby saving labor, and forming a valuable and complete *brief* upon a vast number of legal questions. With these impressions and objects in view the author has attempted, in the volume now offered to the profession, to at least approximate some of these desirable results. Such an undertaking appeared more necessary in consequence of the vast legislative changes, both in England and America, within a comparatively short period of time.

In England, and most of the States of the Union, the jurisdictions of courts of law and equity have been blended. Changes have been made in the statutes of limitations, while changes of a most radical character have been made respecting the rights and liabilities of husband and wife, their dealings with each other, the separate estate of the wife, the right of dower, etc. Prior to this legislation the separate estate of the wife was most usually created by deed, will, or settlement; but *now*, in consequence of

either legislative enactments or constitutional provisions, all the property of the wife is converted into a *separate estate*—a *statutory separate estate*. As to what are the effects of these acts upon the marital rights of the husband, upon the power of the wife over the same, and the modes of charging it with her debts, contracts, and obligations, many nice and difficult questions have arisen. Some of the States have the common-law dower, while the greater number have a *statutory dower*.

In regard to code procedure, New York, perhaps, set the first complete example of the code system, from which many others have been copied. Some of the States never did follow the regular common-law pleading, but adopted a code at the beginning. Others of the States adopted a code procedure at a later date, some as late as the year 1868, and perhaps later. For a time some of these codes tended in the direction of confusion and uncertainty; but the courts, in *construing* their provisions according to long-established principles, have “poured on the light;” the profession and the country have become more reconciled to these innovations (as they were considered by many). Indeed, the bar and the court took a sort of “*scare*” at this code system; yet, on a more thorough knowledge of the science of pleading, both in law and equity, and a continual resort to first “landmarks,” the difficulties have been lessened each year. In fact, the blending of the courts of law and equity has had the effect to retain *both systems*. Radical changes in *forms* and procedure have been made; but the more general and elementary rules and principles of law remain untouched. The courts in the several States (and the Supreme Court of the United States, in reference to the same change in the District of Columbia) have held that the abolishment of the *old action* of ejectment has not destroyed the advantages pertaining to such action, nor essentially changed the fundamental rules of law by which the old action was governed, the changes having been mostly in reference to the pleadings. It is a great error to suppose that the new system, by which the jurisdictions are united, and the former pleadings dispensed with, that the *science* of pleading has been rendered obsolete, or that a knowledge of equitable jurisprudence has been rendered unnecessary; on the contrary, a more *thorough* knowledge of the same is re-

quired, in order to understand the *new* procedure, and to make its application effectual and harmonious.

In the progress of this treatise the author has made an honest and laborious effort to adapt the work to this new legislation. The latest adjudications of the several States and of England have been collected, down to the time of going to press. A large number of individual cases have been discussed by name, in order to more fully illustrate some important principle involved, at the same time opposite and conflicting views of the courts are given. In several instances he has attempted to give the reason and philosophy of certain rules of law and evidence, and the modifications and exceptions to such general rules have been traced and designated. Very few positions have been taken without a reference to one or more cases to support the same; for, as has been pertinently said, "aside from the higher functions of a treatise, that of *assimilating* the law, and presenting it in a homogeneous, synthetical form, of value chiefly to the lawgiver and philosopher, and it may be to the student wrestling with elementary principles, it should perform the humbler, but to the practitioner infinitely more important, task of pointing out not only what the law is in detail, but also in what State and by what court it has been so announced. To him it is of little advantage to know that "in some State" the law is thus and so, unless he can show which States are included, and whether it is so held under a peculiar statute, or the English or American common law."

Indeed, "the doctrine of *stare decisis* is an inherent element of our legal system, either American or English. The law is administered in the light of antecedent adjudications. Statutes are construed, the common law announced, and, where both are silent, the law of the case laid down by judges and chancellors upon every issue properly presented before them; and every point so decided is thenceforth the law of the land until reversed or modified by a competent court of last resort. A text-book in America, on a subject so thoroughly American in its development, and so fruitful of new ideas, asserting their independence of the English common law, and constituting an American common law instead, is useful to the practitioner only in so far as it guides him to the source of this new law. What he needs to enable him to reliably

advise his clients, or insure success in the forum, is less a thorough knowledge of the statute, of the English common law, or even of the *ipse dixit* of a standard author on the subject in question, than to be able to point out what has been decided by the courts in the State of the forum, or in a sister State, or by a Federal court, upon such point, or upon an analogous or cognate subject. Have he ever so clear an insight into the precise meaning of the statute, understand he ever so thoroughly the meaning of the standard author, or the common law, the advice to his clients cannot be safely based on such knowledge alone, for in the forum the chances are that all those authorities will succumb to the citation of a late decision of some American court. Unless, then, the American text-book cite or quote the authority upon which it asserts any proposition, its chief utility will be lost to the practitioner." A writer, speaking of substantive law, says: "It consists of legal principles, lying above, and beneath, and around, and amid the decisions."

During the several years employed in the preparation of this volume the author has had free access to the Law Library at Washington, D. C., and has spared no pains in sifting and collecting the numerous authorities, both in England and America. The encouragement thus far received, from so large a number of the profession, tends greatly to alleviate the apprehension felt at the beginning of this effort; and, fully conscious of some defects and errors, this volume is submitted to the public, with the hope that at least *some* good has been done within the range contemplated in the enterprise.

W. H. MALONE.

ASHEVILLE, N. C., July, 1883.

CONTENTS.

CHAPTER I.

The Action of Ejectment—Action to Recover Land, . . .	17-82
---	-------

CHAPTER II.

Trial—Practice—Evidence, etc.,	83-119
--	--------

CHAPTER III.

Action for Mesne Profits and Damages,	119-135
---	---------

CHAPTER IV.

Improvements,	135-146
-------------------------	---------

CHAPTER V.

First Link in the Chain of Title,	146-172
---	---------

CHAPTER VI.

Other Links—Deeds—Wills—Settlements—Leases, etc.	172-199
--	---------

CHAPTER VII.

Presumptions of Law—Grants and Deeds presumed to exist from Lapse of Time,	199-209
---	---------

CHAPTER VIII.

Boundary—Parol Evidence, etc.,	209-256
--	---------

CHAPTER IX.

Statutes of Limitations—Lappage—Color of Title, etc.,	257-302
---	---------

CHAPTER X.

When Title is founded on Execution Sales,	302-328
---	---------

CHAPTER XI.

Of Judicial Sales,	328-367
------------------------------	---------

CHAPTER XII.

Estoppels—Equitable—Legal,	367-402
--------------------------------------	---------

CHAPTER XIII.

Estoppels, as applied to Married Women,	402-423
---	---------

CHAPTER XIV.

Purchaser with Notice—The Doctrine of Notice—Priorities, etc.,	423-473
--	---------

CHAPTER XV.

The Doctrine of Trusts as applied to Real Property—Express and Implied—Resultant and Constructive,	473-521
--	---------

CHAPTER XVI.

The Separate Estate of the Wife in Real Property—Modes of charging the same by Contract, Express or Implied—Her Rights, Liabilities, etc.,	521-586
--	---------

CHAPTER XVII.

Conveyances and Dealings between Husband and Wife,	587-628
--	---------

CHAPTER XVIII.

The Doctrine of Dower—Statutory Changes—The modes of Barring and Enforcing the same,	629-726
--	---------

CHAPTER XIX.

Liability of Real Estates for the Debts of Deceased Persons,	727-776
--	---------

REAL PROPERTY TRIALS.

CHAPTER I.

THE ACTION OF EJECTMENT.

IN a treatise on real property trials the action of ejectment, in some or all of its forms and changes, must necessarily have a conspicuous position. In order to better understand the legal remedies to recover land, employed at the present day, the form, nature, and fundamental principles of the *technical action of ejectment* should be thoroughly understood.

In the early ages of Europe, when the public wealth consisted mostly of lands, the importance and necessity for some remedy to recover that possession which was lost by the wrongful act of the trespasser, was felt and acknowledged.

The difference between personal and real property necessarily required a different kind of action and a different mode of redress. In the case of goods and chattels, if taken away and destroyed, the remedy was by an action against the person of the trespasser, and all he could recover was compensation in money, by way of damages, or in some article of equal value.* While in the case of land, if the owner be ejected the land remained where it was, and he is entitled to be *restored* to the possession by the enforcement of the appropriate remedy. The great feudal system was introduced into England by the Norman Conquest in the eleventh century, which continued until the restoration of Charles II., during which period the disputes about land were almost entirely between lords and tenants, and but little attention had been given to controversies respecting the absolute title to the same. What is known as the *feudal system* seems to have originated in the

* Williams's Law of Real Property.

northern nations, who came from the forests of Germany and overturned the Roman Empire and established themselves in the southern parts of Europe; it is said the Danes and Saxons, who at different periods before the Norman Conquest were "swarms from the northern hive."

The Saxons, on taking possession of England, exterminated the ancient inhabitants, and established their own laws and customs. The French nation, too, had their origin from a tribe of Germans, who are supposed to have crossed the Rhine under Clovis, about the year 481, and settled in the northern provinces of France. The codes of laws by which the German tribes were governed were generally formed by their several great military leaders and chiefs. What is known as the Salic law, is supposed to have been written in the fifth century, and was but the embodiment of laws made by their chiefs and lords.

In those early periods, war and conquest were the chief occupations of mankind; agricultural pursuits were almost unknown; consequently the true value of landed estates was not recognized. During the reigns of the early French monarchs, it was usual for the nation to meet in general assembly once or twice a year, and make ordinances which acquired the force of law. France was divided into a vast number of what were called seigniories, whose lords acknowledged a feudal dependency on the monarch.

Normandy was a province in the southern part of France, and was ceded to a ruler by the name of Rollo in the year 912, but to be held of the crown of France by homage and fealty. Normandy up to the time of the Conquest having been disturbed less by the wars of the tenth and eleventh centuries than most of the provinces of France, suffered less from the mixture with the canon and civil law, consequently preserved most of the laws and customs of their ancestry. The battle of Hastings completed the conquest by William of Normandy, known in history as the Norman Conquest, by which England was under the control of this daring leader and his followers.

The customary laws of the province of Normandy were immediately introduced into England, from which the ancient laws of England are derived, and from which we trace the origin of many rules as to real property now enforced in the American States. During this period there were only two tenures, or modes of

holding real property upon the Continent, which were called *allodial* and *feudal*. *Allodial* lands were those whereof the owner had the complete and absolute property, free from all conditions of servitude to any particular lord. This *allodial* title was of the nature of our fee simple title at the present day. Some of the ancient law writers in France say that the word *allodium* is derived from *los*, which signifies *lot*. That is to say, when a conquest was made by a daring leader and his followers, the lands were often distributed by *lot* among the chief followers, according to rank and service, who took the absolute control of the same, and exercised all the rights of a freeholder. This tenure therefore was called *allodial*.

The Feudal Tenure.—"A feud," says Mr. Cruise, "was a tract of land acquired by the voluntary and gratuitous donation of a superior; and held on condition of fidelity and certain services, which were, in general, of a military nature. The tenure of the feudatory was of the most precarious kind, depending entirely on the will and pleasure of the person who granted it."

But, as we shall see, the necessities of the times, and mutual interests of the parties, required that certain obligations should exist, and which should be enforced, even of this precarious interest. The feudal tenure had its origin from the fact that no individual German had any private property in land; it all belonged to the nation or tribe. The nation allowed each person a limited portion of land for his support, which land returned to the public after the individual had reaped the fruits thereof; and with these ideas and this practice the Germans made conquests. After a conquest, each individual who aspired to be a leader or a person of distinction, claimed an allotment of land suited to his rank and distinction, and the title was considered as *allodial*, or absolute in these favored persons. But in these troublesome times it was natural that these leaders and chiefs, thus possessed of vast bodies of land, desired to attach to their persons certain adherents and followers. These adherents were called *comites*.

They therefore bestowed a part of the land allotted to them on their adherents as a reward for their fidelity, and as a consideration for assistance, mostly of a military character, to be rendered by these adherents. These "feuds" were granted by kings and princes and also by the great lords, to whom they had allotted

extensive tracts of lands. In order to have the protection of the chief lord, many persons gave up their *allodial titles* and accepted the more uncertain tenure of the *feud*, preferring the patronage and reciprocal protection of the lord or chief to the absolute ownership of the land, which possessions were indeed worthless without some powerful protection.

The civilians called this *allodial* tenure, the *proprietas*, which is the absolute property, and the feudal tenure was called *dominium utile*, which is only the right of using the thing for a certain time, and without the power of absolute disposition or alienation.

There were several kinds of feuds, as for instance, while all feuds required certain kinds of service and fealty from the tenant, feuds being granted by a sovereign prince conferred a kind of nobility on the grantee, and was called *feudum nobile*; sometimes, a title of honor was annexed to the land, called *feudum dignitatus*.

The Mode of Granting these Feuds.—They were originally granted by a solemn and public delivery by the lord to the vassal in the presence of other vassals as witnesses of the transaction, and this mode of granting the same was considered essential to the creation of a feud. These witnesses were called for the advantage of the lord and the vassal. But it was frequently inconvenient for the lord to go upon the land intended to be granted, and in that instance, a symbolical transfer of the lands was made, by the delivery of a staff, a sword, or robe; this was what was called an improper investiture as distinguished from possession. Now at the time of the delivery of possession by either of the modes, the particular services which the vassal was required to perform were declared by the lord, and became incorporated as a part of the contract and obligation of the contracting parties.

In time, these contracts were reduced to writing, which was attested by other vassals, called a *breve testatum*. Upon the creation of this feud, the required obligations between lord and vassal was considered by the feudal writers as stronger than any natural ties whatever, all of which the vassal was required to acknowledge by taking the *oath of fidelity* to the lord. This idea of the oath of fidelity was borrowed from the practice of the German princes and their *comites*.

As to the reciprocal duties of lord and vassal and nature of this estate the reader is referred to Cruise's Real Property.*

This peculiar system of land laws existed down to the restoration of Charles II., being abolished by statute 12 Car. II., chapter 24.†

The Remedies used in these Times.—It might be said that during the feudal times the interests of the inferior tenantry were disregarded to a considerable extent, so far as legal remedies were concerned, and the remedies were confined to freehold estates vested in the superior landholder. The old writ of *covenant* was used for the recovery of the term as well as damage; but this only extended to cases in which there was a breach of the original contract, and consequently the tenant was without any means of redress when dispossessed of his land by the act of a stranger not claiming under the grantor.

This writ of covenant was the sole remedy for the tenant for several ages after the Conquest; but during the time of King Henry III. a writ was invented called the writ of *quare ejecit infra terminum*. This writ was intended to give a remedy against all persons whatsoever claiming under the title of the grantor. But this latter remedy was inadequate, because the tenant had no remedy when dispossessed by a mere stranger not holding under the grantor.

So that in the reign of King Edward II., or in the early part of the reign of Edward III., a writ was invented which gave the lessee for years a remedy against all persons whatsoever who ousted him of his term except the grantor himself. This new writ was an action of trespass in its nature. Says Mr. Adams: "This writ called upon the defendant to show wherefore with force and arms he entered upon certain lands which had been demised to the plaintiff for a term then unexpired and ejected him from the possession thereof."

He further says: "It is upon this writ, though apparently so dissimilar from the present practice, that the modern remedy by ejectment is founded."

The action of ejectment is defined by Mr. Roscoe in his treatise on Real Actions as a "possessory remedy, by which a person who

* Cruise, Real Prop., Book I., Secs. 48 to 57, 72, 79.

† Williams, Real Property, 5.

has a right of entry upon any corporeal hereditaments may acquire the possession, whether he be tenant in fee, in tail, for life, for years, or by elegit or statute merchant."

In the earlier periods of the law the rights of the *freeholder* to the possession or property in lands was always tried in what was called a *real action*.

These *real actions* were of various kinds, and was a complicated and refined system of remedies now generally obsolete in this country and in England. It will be observed that the writ of covenant, the writ of *quare ejecit infra terminum*, and the possessory writ subsequently formed in the time of Edward III., were intended to give a remedy simply to the tenant who held under the feudal tenure, but the real title to the land was not tried; and even for this purpose the remedy was inadequate.

The freehold title was determined by the tedious and now obsolete real action. On this point Mr. Adams further says: "When, however, the feudal policy declined and agriculture became the object of legislative regard, the value and importance of estates of this nature considerably increased, and it was necessary to afford lessees for years a more effectual protection.

"It then became the practice for leaseholders, when disturbed in their possessions, to apply to courts of equity for redress, and to prosecute suits against the lessor himself to obtain a specific performance of the grant, or strangers for perpetual injunction to quiet the possession; and these courts would then compel a restitution of the land itself to the party immediately injured. The courts of common law soon afterwards adopted this method of rendering substantial justice; not indeed by the invention of a new writ, which perhaps would have been the best and most prudent method, but by adapting the one already in existence to the circumstances of the times, and introducing in the prosecution of a writ of ejectment, a species of remedy neither warranted by the original writ, nor demanded by the declaration, namely, a judgment to recover the term and a writ of possession therefor."

It will, therefore, be seen that an action intended only to recover damages, and to enforce the rights shown to have existed between the lord and vassal during the existence of the feudal tenures, became the *regular mode of trying title to land among freeholders*. This readiness of the freeholder to adopt any remedy

adequate to his protection, is accounted for by his desire to get rid of the innumerable difficulties which attend *real actions*.

The Peculiarities of the old Action of Ejectment.—In this original action the *plaintiff* was always the *tenant in possession*, and if successful recovered his term yet unexpired, and damage for the detention, and as finally enlarged a writ of possession was awarded to place the tenant in possession of the land from which he had been ejected.

Remember that the old writ of covenant only allowed the lord to be sued; and the writ called *quare ejecit infra terminum* provided a remedy for the termor who was dispossessed of his lands by any person holding under the title of the grantor.

Both of these writs being inadequate, it is said that half a century subsequent a new writ was invented called *ejectione firme*, which gave the party damages but did not restore the term, but did apply against strangers. But as we have seen, the new writ, in the time of Edward II. or Edward III., gave the tenant a remedy against all persons whatsoever who ousted him of his term, except as shown by Mr. Adams where the grantor himself ejected the lessee, and subsequently enfeoffed another, in which case the old writ of *quare ejecit* was resorted to. But the adoption of the technical action of ejectment not only gave a complete remedy to the tenant holding under the lease, but was adopted in lieu of real actions by those having the *proprietas* to try both the question of title and the right to the possession.

The Indirect Mode of Trying Title.—The adoption of this action to determine the title of the freeholder required certain formalities, to wit: It was necessary for the real owner to enter upon the land and sign a lease in favor of a person, who was immediately supposed to be in possession. This lessee brought the suit, in whose favor judgment was rendered, and who would immediately deliver the possession to the true owner of the land; the lessee acting more as the friend of the lessor than as real claimant.

The lease thus being signed as stated, the person who next came upon the freehold, *animo possidendi*, or even accidentally, was considered an ejector of the lessee, and, of course, a trespasser. The lessee then procured a writ of trespass and ejectment to be served on this ejector or trespasser.

This lessee, in order to recover, was bound to show title in the lessor, and in that way the title to the land was tried, not directly between the parties, but in an indirect way.

The issue was made by the ejector either claiming title in himself or some one else, other than the lessor.

The lease made by the claimant was void, except made while actually in possession of the land. Hence, if the owner of land found a party in possession, he could not sue in his own name, but must first make an *actual* entry upon the land, sign a lease in favor of another party, and that other party brings the suit. The party who was in possession before the signing of the lease was, in contemplation of law, to be upon the lands, *animo possidendi*; the lessee and friend of the claimant was allowed to consider him as casual ejector, and to make him defendant in the action. The reason why the lease was required to be executed on the land was the common-law principle which made all conveyance of real estate champertous and void, as to the party in adverse possession, if made by a party who was out of possession at the time of the conveyance, and maintenance was a criminal offence. When this remedy became more generally adopted, one flagrant abuse was often the result. The party in possession, either claiming the land for himself or for another, was certainly entitled to be made a party to any proceedings to affect these rights, but the anomalous character of this action seemed to allow the friend of the claimant to resort to the following abuse: The lessee and friend of the claimant of the land, in many instances, would conceal the proceedings from the party in possession, and would procure a second friend to enter upon the lands, and eject him forthwith on the execution and delivery of the lease. This second friend would then be sued by the first friend as lessee, and the proceedings progressing to judgment, the party in possession might be ousted of his lands without a day in court to defend his title. To obviate this abuse, the courts adopted a rule which forbid the plaintiff in ejectment to proceed without giving notice to the party in possession, who could apply to the court to become a party in order to defend his title. The establishment of the rule above mentioned, of giving notice to the party actually in possession, originated a general practice for the claimant to have some third person to enter on the land after the lease. This person is

called the *casual ejector*. And then, under the rule, regular notice was given to the *party in possession*, which said notice was in the name of this casual ejector. Now, the service of the writ in ejectment on the casual ejector, and he giving notice to the party in possession, had the precise effect as if the party thus in possession had been made a party directly, for he was bound to appear and defend after this notice, otherwise judgment by default would be taken against the casual ejector, on it being made to appear to the court that such notice had been given.

This was the practice under the writ of ejectment down until the time of the Commonwealth, but much trouble and inconveniences attended the different formalities, as appears by the following illustration given by Mr. Adams: "If several persons were in possession of the disputed lands it was necessary to execute separate leases upon the premises of the different tenants, and to commence separate actions upon the several leases. Difficulties also attended the making of entries, and the action of ejectment had by this time grown into such general use as to make these inconveniences sensibly felt."

The Fictitious Lease.—It is said, to obviate the troubles and abuses incident to this action, "a remedy was discovered by Lord Chief Justice Rolle, who presided in the Court of Upper Bench during the Protectorate; and a method of proceeding in ejectment was invented by him, which at once superseded the ancient practice, and has by degrees become fully adapted to the modern uses of the action." By this method of proceedings, all the formalities herein described are dispensed with :

1. The claimant was not required to go upon the land and seal a lease;—no entry by the lessee was actually made.
2. No ouster was really made as under the ancient action required.
3. The plaintiff and defendant were mere fictitious names, as John Den and Richard Fen.
4. The preliminaries actually required in the old mode are only feigned.

In this action it is assumed that the claimant who wishes to sue for his lands, has leased or demised to John Den the land in controversy for a term of years. Then it is assumed that one Richard

Fen broke and entered the close and ousted John Den (who, of course, is supposed to be in possession under the lease from the real claimant).

Thereupon John Den, as lessee of the real claimant, sues Richard Fen for trespass and ejectment. And Richard Fen as is supposed, immediately gives notice to the person actually in possession, stating that he is sued as the casual ejector, and does not claim title, and requests the person in possession to appear and defend.

The Consent Rule.—The party in possession who has received the notice from the casual ejector, if he wish to defend, must enter into the “*consent rule*,” which is a confession of four things: 1, lease; 2, entry; 3, ouster; 4, and upon the trial plead the general issue to rely on the title only.

In this action no summons was issued as in other actions at law, but the *declaration* was the *original process*, a copy of which, with the notice from the casual ejector, was always left by the sheriff with the party or parties in possession. As an illustration of these curious formalities, and as a remembrance to those now engaged in the code practice, of a once venerated legal proceeding, a *declaration* in ejectment is given in the note.*

* The following is the substance of the declaration and notice to the tenant in possession of the action of ejectment when the *fiction*s were retained:

“Richard Roe was attached to answer John Doe of a plea, wherefore he, the said Richard Roe, with force and arms, entered into a certain messuage and tract of land, containing ——— acres—situate ——— (described); and which A. B. has demised to the said John Doe for a term which is yet unexpired, and ejected him from his said farm, and other wrongs to the said John Doe then and there did. And thereupon the said John Doe by attorney complains: That whereas the said A. B., on the first day of January, A.D. 1848, in the county aforesaid, had demised to the said John Doe the said tenement, to have and to hold the same to the said John Doe and his assigns, from thenceforth, for and during, and unto the full term of twenty-one years from thence next ensuing. By virtue of which said demise, the said John Doe entered into the said tenement, and became and was possessed thereof for the said term so to him thereof granted. And the said John Doe, being so thereof possessed, the said Richard Roe, afterwards, to wit, on the day and year aforesaid, with force and arms, entered into the said tenement in which the said John Doe was so interested, in manner and for the term aforesaid, which is not yet expired, and *ejected* the said John Doe from his said farm, and other wrongs to the said John Doe then and there did, to the great damage of the said John Doe, and against

This action was adopted in most of the colonies and older States of the Union. Writs of entry were adopted in the State of Massachusetts. Mr. Justice Jackson says, "that writs of entry, as conducted by the courts of his State (Massachusetts), were considered more simple, convenient, and effectual, than the action of ejectment; the writ and declaration were shorter; there were no mysterious fictions to incumber the record, and the judgment effectually settled the right of possession."* Speaking of New England, Messrs. Sedwick and Wait say: "Ejectment was already firmly established in England as the most simple and expeditious method of trying controverted titles when our Atlantic seaboard was colonized; yet the New England colonists seem to have been disinclined to transplant and foster the remedy." Professor Stearns says:† "We should hardly expect them to resort to the indirect method of *making a lease* of their lands in order to try titles. And as to the *confessing a lease, an entry, and an ouster*, which never had any existence, in fact, they seem (as we should naturally expect) to have regarded it as a *violation of truth*, and therefore wholly inadmissible."‡ But the real actions, as used in the New England States, were stripped of many of the ancient forms and useless appendages, and were called by the general name of actions of ejectment.§

Changes in England and America.—But the action of ejectment as herein described is now almost a thing of the past. Even England, in the year 1852, by statutes 15 and 16 Victoria, etc.,

the peace of the State. Wherefore the said John Doe saith that he is injured and hath sustained damage, to the value of fifty dollars, and therefore he brings suit.

"J—— S——,

"Plaintiff's attorney."

MR. C. D. (or JOHN SMITH).

I am informed that you are in possession of a claim title in the premises in this declaration mentioned, or to some part thereof, and I, being sued in this action as a casual ejector only, do advise you to appear in the court (stating the court) to be held on ——— next, then and there, by rule of the said court, to cause yourself to be made defendant in my stead, otherwise I shall suffer judgment to be entered by default, and you will be turned out of possession.

Your loving friend,

Date ———.

RICHARD ROE.

* Jackson, Real Actions, p. 2.

† Stearns on Real Actions, 396.

‡ Sedwick & Wait (Trial of Title to Land), 73.

§ Jackson on Real Actions, p. 194.

passed what is called the "Common Law Procedure Act." This action, with its fictitious and feigned issues, has been superseded by another procedure, in which the action is brought in the name of the *real party in interest*. This is what might be called a statutory ejectment, in which a great number of forms are prescribed, and a tedious detail of legislative requirements.

Whether this is an improvement on the old action or not seems doubtful. Mr. Cole in his work on Ejectment, published in 1856, submits about six hundred different "forms" to be used in connection with the new action of ejectment created by statute 15 and 16 Victoria, ch. 75.*

Mr. Cole thus speaks on the first page of his book: "Before the passing of the Common Law Procedure Act, 1852, actions of ejectment were, in point of form, pure fictions, but in substance and effect they were serious realities.† The action was commenced (without any writ) by a declaration, *every word of which was untrue*; it alleged a *lease* from the claimant to the nominal plaintiff (John Doe); an *entry* by him under and by virtue of such lease; and his subsequent *ouster* by the nominal defendant (Richard Roe); at the foot of the declaration was a notice addressed to the *tenants in possession*, warning them, unless they appeared and defended the action within the specified time, *they would be turned out of possession*."

The changes in the different States have been gradual, but all tending to one general result, namely, to have the suit prosecuted

* Cole on Ejectment (published in 1856).

The form of the declaration used under the act is here presented, in order to show the variety of procedure at the present day used in the action of ejectment.

"Victoria, etc., to X. Y. Z. (names of all tenants in possession), and all persons entitled to defend the possession of ———, in the parish of ———, in the county of ———, to the possession whereof A, B, and C, some one of them claim to be (or to have been on and since the — day of —, A.D.) entitled, and to eject all other persons therefrom; these are to will and command you, or such of you as deny the alleged title, within sixteen days after service hereof, to appear in our court of ——— to defend the said property, or such part thereof as you may be advised; in default whereof judgment may be signed, and you turned out of possession." C. L. P., 1852. Schedule (A), No. 13. Cole on Ejectment.

† See the novel of "Ten Thousand a Year," for an amusing illustration of this action. As to history of the action, see Adams's Ejectment; Chit. Arch. Prac., 914-983.

in the name of the real party, the title directly tried, and the judgment as an estoppel. It will not be forgotten that one great objection to the action of ejectment under its forms of procedure, was the fact that the judgment was not conclusive upon the title or right of property, even between the parties. "The action could be repeated and the same questions retried indefinitely, because there was no privity between the successive fictitious plaintiffs, and the record and judgment, unlike a real action, did not reveal the nature of the title that had been established upon the former trial. Each successive ejectment was a *new* lease, entry, and ouster. The title was never formally or directly in issue, but was tried collaterally. The gist of the action was the trespass of the defendant and the plaintiff's right to the possession. Every fresh trespass was a fresh cause of action.

"As the right of property might be in one person, the right of possession in a second, and the actual possession in a third, the judgment for the possession did not necessarily conclude the title. Under the feudal system a peculiar sanctity attached to a man's right of possession of land, and when ejectments were introduced the courts were reluctant to hold that he must stake his possession upon the results of a single trial, but inclined to afford him ample and repeated opportunity to exhibit his title and prove his rights."*

The earlier remedy was an application to a court of chancery for an injunction to be made perpetual against further ejectments where the party had been repeatedly successful. The House of Lords, upon appeal, granted an injunction in the case of *Earl of Bath v. Sherwin*,† against further ejectments, after five verdicts, in as many successive ejectments, had been rendered in three different counties in favor of the defendants.

It is said that only two fictitious actions of ejectment upon the English model are to be found in the court records of Massachusetts.‡ Hence, there is shown a disposition in the older States to substitute a different procedure, called generally by the name of ejectment. Thus, the State of Georgia, in 1847, without repeal-

* Sedwick & Wait, 42. See *Jackson v. Haviland*, 13 Johns (N. Y.), 229; *Dawley v. Brown*, 79 N. Y., 390; *Strother v. Lucas*, 12 Peters U. S., 410.

† *Earl of Bath v. Sherwin*, 4 Brown's Par. Rep., 373.

‡ Sedwick & Wait, 74; *Stearns on Real Actions*, 2d ed., 396.

ing the old action of ejectment, gives parties the option to dispense with the lease and fiction, and to present a petition in which the *title is claimed*, etc. Under this act the courts of that State held that the judgment was conclusive, that the title to the land was directly in issue.*

As early as 1791, in South Carolina, "trespass to try title" was substituted for ejectment. It was in form an action of trespass *quare clausum fregit*, except that a notice was indorsed upon the writ that the action was brought to try title as well as damages.†

But now this remedy by "trespass to try title" has been abolished in South Carolina, and an action to recover real property substituted in its stead.‡ The State of Illinois, by act of March 20th, 1872, retains the remedy under the name of *ejectment*, but changes many of the features of the old action; it abolishes the fiction and also the common-law action of mesne profits, etc. Tennessee, in 1852, under a strong sentiment being manufactured in regard to what was called "Law Reform," abolished the old technical action of ejectment, and substituted a new statutory ejectment procedure. Alabama, in 1821, had substituted "trespass to try title" for the fictitious action. But it seems that all the principles and rules relating to ejectment at common law were retained in Alabama except the fictitious proceedings.§

After several changes in Alabama it seems that in 1863 the action of ejectment as it existed at common law was restored, and in all actions to recover land the plaintiff was allowed to elect between a writ of ejectment and a writ in the nature of an action of ejectment. And this act was embodied in the code of 1867 and transferred to the code of 1876.||

Messrs. Sedwick & Wait call attention to the fact that, as late as 1876, John Doe, the litigious lessee, appears in his old rôle in an ejectment in Alabama. The suit being instituted in 1874 and decided in 1876.¶ In North Carolina John Doe and that "lov-

* *Sims v. Smith*, 19 Ga., 124. See also *Brewer v. Beckwith*, 35 Miss., 467.

† Stat. at large, S. C., vol. v., p. 170. Since repealed. Chapter 147, general statute, p. 801.

‡ Revised Statutes S. C. (ed. 1873), p. 586.

§ *Sedw. & Wait*, § 88; *Avent v. Read*, 2 Porter (Ala.), 480.

|| See Code 1867, § 2621; Code of 1876, § 2970.

¶ *Doe ex dem. Davis v. Minge*, 56 Ala., 121; *Sedw. & Wait*, § 90.

ing friend," Richard Fen, were venerated for their age and reputation until 1868, when, without being requested so to do by the profession or the people, the convention of that date laid hands upon these ancient and venerable personages, and consigned them to the same tomb in which numerous other relics of the past were consigned. In Virginia the writs of right of entry, and of formodon, had been abolished, and ejectment as reformed and corrected by statute retained.

In New York the entire system is superseded by a statutory action of ejectment. In Virginia, New York, and West Virginia, the statutory ejectment may be maintained in the same cases in which a writ of right could have been brought.* In Texas, ejectment, with or without its fictions, has not been in use, trespass to try title being the exclusive action given for the trial of controverted titles in that State.†

None of the common-law forms were ever adopted by the State of California. The acts of 1850 adopted the New York code, as did others of the Western and Pacific States and Territories. In those States, as in most of the others, where the code practice prevails, and where the statutory action to recover land is adopted, the "complaint," "declaration," or petition is required to be "in ordinary concise language."

It is said of California, that "technically and substantially we have no action of ejectment," yet the action is *called ejectment*. And while the procedure to try title in that State is called ejectment, it is said by the courts it must not be confounded with the old technical action, for in that, the "forms" constituted the *substance* of the action at common law.‡

THE ACTION TO RECOVER LAND—EJECTMENT.

The science of law has reference to principles and procedure. And while the essential elementary principles of law are the same in most civilized and Christian countries, the procedure by which

* *Genin v. Ingersoll*, 2 W. Va., 558. Since 1868 the State of West Virginia has superseded the system of real actions by statutory ejectment.

† *Paechal's Digest*, Art. 5292; *Dangerfield v. Paechal*, 20 Tex., 552; *Birk v. Miller*, 20 Tex., 572. See the difference between trespass and fictitious ejectment discussed in the case of *Hillman v. Baumbach*, 21 Tex., 203.

‡ *Carpenter v. Schmidt*, 26 Cal., 479.

these principles are enforced are different and as diversified as any other subject of local legislation among nations and States. The strict and formal rules of pleading at common law have been abolished or greatly modified in most of the United States; many of the new States did originally adopt a code of procedure, and never had the common-law pleadings. Under the old system, in the action of ejectment the declaration was the process by which the defendant in possession was brought into court, and the action being purely a possessory action in the nature of an action of trespass, the defendant always pleaded the general issue, "not guilty of the trespass in ejectment in manner and form," etc. The effect of this plea was, to put the plaintiff to the proof of his right to the possession when the suit was brought. In the technical action of ejectment, in order to a recovery the plaintiff was required to show :

1. A legal title, the equitable estate not sufficient.
2. In the name of the trustee, and not *cestui que trust*.
3. Being a possessory remedy, he was required to show a right to the possession (right of entry) on the day of the demise; so that if the statute of limitations had barred the entry, he could not recover.*

It is well to observe, that notwithstanding the changes by statute, when the object of the suit is to recover the possession of land, and to establish the title to the same, much of the law and evidence and practice applicable to the fictitious action are applicable and indispensable in the new legislative actions. These changes affect the "forms" more than the "substance." These changes allow the *real party* to sue, and dispense with the declaration in its technical form, and the fictitious lease, and in some instances the "claimant," although out of possession, may be sued; provisions are made for the making party defendants, and other minor details; but there are certain elementary principles and long-established modes of practice which are substantially and effectually observed in all actions to try the title to land.†

* Tidd's Practice, vol. ii., 1189.

† *Woody v. Gilliam*, 64 N. C., 649; *Hawkey v. Houston*, 65 N. C., 137. In the case of *Woody v. Gilliam* it is said that no particular form of action is prescribed in North Carolina for the trial of title to land. The real party in interest sues, and the complaint is substituted for the declaration. The courts must, therefore, be governed in the main by the law of ejectment.

The Complaint as a Substitute for the Declaration.—It would seem that when the legislature provides that the first pleading on the part of the plaintiff is the *complaint*, and that the "facts constituting the cause of action" shall be stated therein in "a plain and concise statement," or "in ordinary concise language," that but little trouble would arise as to what was a sufficient complaint.

But we have the authority of C. J. Field for the statement that much diversity of opinion had existed in California as to what allegations were sufficient to constitute a valid complaint in an action to try the title to land. In the case of *Payne and Dewey v. Treadwell*,* C. J. Field delivered the opinion of the court, with a full review of the decisions in New York and other States where the code practice prevailed. The complaint in that case alleged "that the said plaintiffs are the *owners in fee* as tenants in common, etc., and that defendant *wrongfully entered* and *wrongfully withholds*" the possession, etc. The objection was made that the *allegations* were those of *law* and not of *fact*. But the court overruled the objection, and held the complaint good; Judge Field deciding that the allegation that defendant "unlawfully" holds was unnecessary.

The reason given by Judge Field was, that the allegation of seizin and ownership in the plaintiff, and right to the possession, made any possession of the defendant "unlawful." He cited several cases from New York† to sustain this position. He said that it was quite common to use the expression "unlawfully" holds, which is a *conclusion of law*, but it is not necessary.

But Sedwick & Wait, and Bliss in his Annotated Code seem to understand the decisions in that State as requiring the complaint to show that the defendant "unlawfully" or "wrongfully" withholds the possession.

* *Payne and Dewey v. Treadwell*, 16 Cal., 242.

In North Carolina, in a very early case under the code, the complaint claimed title to 380 acres, and alleged that the defendant was in possession of a portion thereof, "about 50 acres;" objection was made that the land unlawfully held by the defendant was not sufficiently described, but the objection was overruled and held sufficient. *Johnson v. Neville*, 65 N. C. A defective complaint is cured by *verdict*. *Wiseman v. Penland*, 79 N. C., 197. In accord, 38 Ill., 226.

† *Ensign v. Sherman*, 14 How. Pr. (N. Y.), 439; 16 How. Practice, N. Y., 308; *Walter v. Lockwood*, 23 Borb., 228.

Say these authors, Sedwick & Wait: "Under the New York practice a complaint which does not set out affirmatively that the possession of the premises is unlawfully withheld from the claimant, is fatally defective."*

It would seem, however, that Judge Field is nearer right, for it must be remembered that the plaintiff is required to show in the complaint, "that he is lawfully seized or possessed of a certain estate in the premises, . . . that he is entitled to the immediate possession of the lands;"† now, with this allegation, *any* holding, says Judge Field, is "unlawful."

Then why allege a conclusion of law?

On examination of the cases of *Ensign v. Sherman*, *Sanders v. Leavy*, and *Walter v. Lockwood*, *supra*, all New York cases, the question of the "unlawful" or "wrongful" holding by the defendant was not involved, the question in each case being the sufficiency of the "right" or title stated by the plaintiff in himself. It was strenuously contended by the lawyers that the statement of "seizin" was a "conclusion of law," and that the plaintiff should state the facts and history of the conveyances, from which the court could see that the plaintiff had title. In each of those cases, however, the complaint alleged "unlawful" or "wrongful" holding.‡

* Sedw. & Wait, § 433, citing *Taylor v. Crane*, 15 How. Pr., N. Y., 358; *Platto v. Jante*, 35 Winse, 629.

† Sedw. & Wait, § 434, citing *People v. Mayor, etc.*, 28 Barb., 240; *Walter v. Lockwood*, 23 Barb., 228.

‡ The following is the complaint in *Walter v. Lockwood*, *supra*:

"The complaint of the above-named John Walter, plaintiff, respectfully shows the court that he has *lawful title as the owner in fee simple*, to the following described real estate, situate, etc. (described). . . . And the said defendant is in possession of said real estate above described, and *unlawfully withholds* possession of the same from the said plaintiff. Wherefore prays judgment, etc."

This complaint after full argument was held good, the court saying there is "no need of stating that he is entitled to immediate possession after what he states, that the defendant *unlawfully* holds, etc." *Walter v. Lockwood*, 23 Barb., 228. The case of *Lawrence v. Wright*, 2 Duer (N. Y.), 673, was overruled. In this latter case the complaint said "that premises were conveyed by Pierce to the plaintiff by warranty deed, and that by virtue of said deed he was seized of the premises." This complaint was held bad, and the profession inferred this meant that all the facts constituting title should be alleged, but this idea was repudiated and the case expressly overruled.

In the case of *Ensign v. Sherman*,* it was admitted by the court that the charge that the defendant *unlawfully withholds* is general and a conclusion of law, but said it had been sanctioned by the New York revised statutes.

Still the precise question as to *how* the charge should be as to defendant, whether "unlawfully," "wrongfully," or simply "in possession," was not before the court.

And Judge Field, as we have seen in the California case, citing the same New York cases, holds that the charge "unlawful" or "wrongful" holding is not necessary. He says, in *Payne and Dewey v. Treadwell*,† "What facts are necessary under this practice to make out a *prima facie* case, are only two, first, that the plaintiff is seized of the premises or some estate therein; second, that the defendant was in possession of the same at the commencement of the suit." He contends that the allegation of *seizin* in the plaintiff and *possession* of the defendant are *issuable facts*, and that the right to the possession follows, and it need not be alleged. The court further argued that these allegations were sufficient to throw the burden on the defendant to explain why he held possession, and the nature of his holding.

In other words the complaint need only state what, if admitted to be true, would entitle the plaintiff to a verdict. That in law, if the plaintiff was *seized of the title in fee*, the possession follows the title, and the defendant being in possession, if he would avoid a verdict and judgment, must show that *he is entitled to the possession* as against the plaintiff who was seized in fee at the time suit was brought.

The doctrine of ejectment has been elaborately discussed in another California case.‡ The discussion arose in this case in holding that a judgment in one action was conclusive in another action, but the principles announced indicate what the pleadings should show:

1st. *What is tried in ejectment?* "It is the right to the possession as between the parties that is tried in ejectment, and this *right to the possession is the title.*"

* *Ensign v. Sherman*, 14 Barb., N. Y., 439.

† *Payne and Dewey v. Treadwell*, 16 Cal., 242.

‡ *Marshall v. Shafter*, 32 Cal., 177 (decided in 1867).

2d. *Issue in ejectment.* "If the plaintiff in his complaint in ejectment avers title in himself, and the defendant interposes a general denial, the respective titles of the plaintiff and defendant are put in issue."

3d. *Judgment in ejectment.* "The party who recovers in ejectment, after a trial on the merits, is successful because his is the better title, whether the plaintiff recovers upon title presumed from prior possession, or the defendant in possession recovers upon the legal presumption of title until true title or prior possession is shown in the plaintiff." "The fact that *judgment is for the possession*, does not prevent a bar nor show that title was not involved."

It was contended in some of these cases, especially in *Marshall v. Shafter*, that the mere fact that the judgment was for *possession** and not for *the title*, was a reason why the judgment was not conclusive as to the *title*; but the court gave the illustrations of the action of replevin where the judgment was always for possession, yet the *title* was involved; and in trespass to lands whatever form of issue, the recovery is only in damage, yet the party is estopped from averring title different from that found.†

The Nature of the Estate—How set forth.—The plaintiff should set forth the nature of the estate, whether in fee, for life, or for years. But it is not necessary to state it in detail, nor need the facts constituting the estate or interest in the land claimed be set forth, but the general form or character of the interest must be averred.‡

In New York, if the plaintiff fail to state the nature of, or the quality of the estate, the advantage should be taken by demurrer, and this objection cannot be taken after verdict.§ The statutes

* In Alabama, it is held that under the statute of that State, and under the common law, the complaint should allege that the plaintiff was possessed of the lands in controversy, and after his right had accrued the defendant entered and unlawfully withheld the premises: *Bush v. Glover*, 47 Ala., 167. But we have seen that Alabama has not entirely killed John Den, the litigious lessee.

† *Outram v. Marewood*, 3 East, 346. Cited cases in note to *Duchess of Kingston's case*, 2 Smith's Lead. Cases.

‡ *Sedw. & Wait*, § 439; *Carpenter v. Schmidt*, 26 Cal., 479; *Bridge v. Cundiff*, 45 Texas, 440; *Thompson v. Wolf*, 6 Oregon, 308; *Austin v. Schlayter*, 7 Hun., N. Y., 275; 15 Illinois, 178; 50 N. Y., 646; 28 Barb., 248.

§ *Clark v. Crego*, 47 Barb., 599.

requiring the nature of the estate to be stated in the complaint, makes it necessary to confine the proof to the kind of estate claimed. Says an author, "If the plaintiff declares on a particular estate or interest, the defendant is justified in preparing to disprove, at the trial, only the allegations of the complaint."*

In Wisconsin, where the complaint was for an undivided interest in lands, the plaintiff was not allowed to show proof for less than that claimed.† Neither on a claim for the whole property could the plaintiff have judgment for an undivided part.‡ This was not the case at common law, but is the result of the statutes.§ Under the statute the ordinary rule of evidence is applied, namely, the proof must correspond to the allegation.

In Tennessee, where the declaration averred an estate in fee in the plaintiff, the estate was sufficiently set forth, and that the pleader need not set forth the claim or title under which the defendant entered.||

These statutes have modified the common-law rule as to pleading particular estates; for it was there required when a party sets up in his own favor an estate tail, an estate for life, a term of years, or tenancy at will, he must show the derivation of that title, from its commencement, that is, from the last seizin in fee simple.¶

The Effect of Setting out Chain of Title and the Anticipation of the Defence of the Defendant.—It has been held, if the plaintiff sets out a specific chain of title, his evidence will be confined to the title as alleged.** And while it is not necessary to aver the evidences of title in the plaintiff, yet if these be alleged, the substantial elements of the title must be stated.††

So in the case where a plaintiff, in anticipation of defendant's

* Sedw. & Wait, § 438.

† 28 Wis., 84-89.

‡ 17 Wis., 169; 16 Cal., 85; 17 Wend., N. Y., 75; 5 Hun., N. Y., 293. So in Illinois, 32 Ill., 489; 49 Ill., 153.

§ Harrison v. Stephens, 12 Wend., N. Y., 170; 18 Ala., 417.

¶ Smith v. Cox, 6 Heiskell, 462. See also Jordan v. Record, 70 Me., 529. See Stephens on Pleading, 304.

¶ Stephens's Pleading, 307; Sedw. & Wait (Trial Title to Lands), §§ 439, 441, 445. See also 45 Tex., 440; 52 Tex., 612.

** Turner v. Ferguson, 39 Tex., 505; 47 Tex., 217; Eagan v. Delaney, 16 Cal., 85.

†† Hughes v. Lane, 6 Texas, 289; Sedw. & Wait, § 443.

answer, and in avoidance of his title, set forth a sheriff's deed under which he alleged the defendant claimed, and then sought to avoid the deed by averments that the property was at the time of the levy and sale homestead.

The answer was a plea of not guilty. It was held that the plaintiff assumed the entire burden of the issue thus made and tendered by him.*

Of course muniments and chain of title, nor evidence of title need not be set forth in the complaint.

In cases where this has been attempted, a motion to strike it out has been sustained by the court.†

Objection has been made to this general mode of pleading allowed by these statutes; so was this objection made to the old action of ejectment; and it is said one of the redeeming features of the intricate systems of real actions was the fact, that the nature of the writ and the judgment record revealed the precise issue involved.‡ It may be that, in the not far distant future, legislation may substitute other rules tending to more certainty and precision. But perhaps it is better to bear the ills we have, rather than to try with those we know not of.

The plaintiff should allege title at the time of the commencement of the suit, or at the time of the wrongful entry by defendant, and must ordinarily prove on the trial that he had title to the premises in dispute on the day named in the complaint or declaration.§

The Declaration on the Legal Title will not Support a Recovery on an Equitable Title.—It is quite obvious that if the plaintiff in his complaint simply claims the legal title, he will not be allowed to establish an equitable title, because this equitable title may be founded upon a state of facts of which the defendant should have notice.

We shall see when treating of the answer of the defendant that where an equitable counter claim is relied upon, that evi-

* *Hill v. Allison*, 51 Tex., 390. See 9 Texas, 462; Sedw. & Wait, § 443.

† *Pease v. Hannah*, 3 Oregon, 301. In accord with what is stated, see 47 Ind., 418; 53 Ind., 208; 50 Cal., 298; 62 Mo., 569; 2 Cal., 182; 23 Cal., 245; 6 Texas, 289; 42 Cal., 346; *Payne v. Treadwell*, 16 Cal., 242; *McCarthy v. Yale*, 39 Cal., 585.

‡ Sedw. & Wait, § 447.

§ Sedw. & Wait, § 435; 8 Minn., 254; 13 Ill., 251; 44 Ill., 30.

dence is not admissible under the general denial or "general issue," but that it requires all the elements of a bill in equity to set the same up. So if the plaintiff wishes to have declared an equitable title, his complaint should, in fact, conform to a regular bill in equity; as for instance, if it is attempted to set up a resultant or constructive trust, the facts must be shown. If *fraud* is the point to be investigated, the facts must be so formally and specifically alleged, so that the court may see that fraud results, the facts being as stated.

And really a complaint of this kind will always be valid, if the elements of a bill in equity as described by Story, are embodied in the same. The statement may be more "concise," but the essential elements of the bill in equity are necessary. This has been repeatedly decided in substance.*

For it is held in some of the States that the blending of law and equity in the same tribunal, and the change of the pleadings, did not have the effect to destroy either system, but rather preserved both; and, consequently, the rules of pleading, evidence, and practice, which prevailed in the old system, are at last the best guides to the courts and the profession. "Forms" are changed,—fictions are abolished,—the same tribunal may have jurisdiction of legal and equitable suits, but the great "landmarks" of the law remain, "the reason of the law" still exists, and no great principle of law has been impaired or abolished. No system of mere *pleading* can affect the right which a man has to assert his *title* to an estate of which he is *ousted*. No "form" of complaint or "concise" answer has attempted to limit the "badges" of fraud or to circumscribe their significance and effect upon the transactions of mankind.

Joint Title and Hostile Title.—Says a recent author: "The title must be truly stated in the declaration. A joint demise can only be supported by showing a title in each to demise the whole. If one of the plaintiffs has no title, or the title is several, the action must fail; and a joint demise by husband and wife, when the title was in the husband alone, cannot be maintained.†

* *Sutton v. Aiken*, 57 Ga., 416; 55 Ga., 12; *Groves v. Marks*, 32 Ind., 319; *Seaton v. Son*, 32 Cal., 481; *Peck v. Newton*, 46 Barb., N. Y., 173.

† *Sedw. & Wait*, §§ 449, 450, §§ 187-189; *Hoyle v. Stowe*, 2 Dev. (N. C.) Law, 318; *Bryan v. Manning*, 6 Jones (N. C.) Law, 334; 48 Tex., 491; 4 Mon.

Hostile plaintiffs cannot join and declare against the defendant.*

Ejectment by Infant.—In case the plaintiff is claiming land which he sold during infancy, he must allege in the complaint that he had disaffirmed the deed prior to the bringing of suit, and had given notice of his intention not to be bound by it.† The New York code allows an infant to maintain a real action in his own name.‡

Complaint where there are Several Defendants.—One declaration in ejectment will lie against several defendants holding different portions of the same tract.§ And where the defendants occupied separately the different stories of the building, it was held, in New York, that the action would lie against all the defendants as being joint trespassers on the land.||

It is obvious that if defendants unite in a joint denial they are liable to a joint verdict.

Co-tenants.—In ejectment between co-tenants the complaint should aver an actual ouster, or some act amounting to a total denial of the plaintiff's right to the possession, and the proof must correspond to sustain ejectment.¶

Under the old form of ejectment, where the defendant entered into the common consent rule, he was precluded from requiring proof of an ouster, but if he desired to admit the title and cotenancy, and to deny the commission of any acts amounting to

(Ky.), 365; 48 Tex., 491. But *contra*, 61 Mo., 96; *Tormey v. Pierce*, 42 Cal., 335.

* *Hubbell v. Lerch*, 58 N. Y., 237. Neither will hostile defendants be allowed to defend against the plaintiff; and if the party making application to become defendant claims *hostile* to the party *already sued*, he will not be permitted to defend.

† *Voorhees v. Voorhees*, 24 Barb., 150; 17 Wend., 119.

‡ New York Code of Civil Procedure, § 1686.

§ *Needham v. Branson*, 5 Ire., N. C. Law, 426; 5 Vt., 250; 3 Rand., Va., 462

|| *Pierce v. Ferris*, 10 N. Y., 280; *Beard v. Federy*, 3 Wall., 478.

¶ See Sedw. & Wait, §§ 276-303; *Covington v. Stewart*, 77 N. C., 148; *Day v. Howard*, 73 N. C., 1; 52 Tex., 383; 43 Cal., 71; *Barnitz v. Casey*, 7 Cranch, 456; *Story v. Saunders*, 8 Hump., Tenn., 663; *Gales v. Hines*, 17 Florida, 773; *Taylor v. Hill*, 10 Leigh, Va., 457; 21 Conn., 379; 5 Mass., 351; 51 Ill., 226; 32 Cal., 493; 11 Rich., S. C. Law, 638; 10 Wend., N. Y., 414; *Halford v. Tethrow*, 2 Jones's Law (N. C.), 393; 31 Ark., 345.

an ouster or total denial of the plaintiff's rights, the court permitted him, upon facts made to appear by affidavit, to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster, unless ouster should be actually proved.*

This special rule was available only when defendant did not dispute the title of his adversary.

The question of ouster is a fact for the jury, and the evidence must be of the most positive and satisfactory nature.† The burden of proof rests on the party alleging it; the law never assumes that the co-tenant is disloyal to the co-tenancy.

Damages for Withholding Possession.—"The claims for mesne profits and damages may properly be joined with the demand for the possession, and the jury, upon finding for the plaintiff, on the main issue, should give a verdict for damages up to the day of the trial.‡

"The claims for damages, and for mesne profits, are separate and distinct causes of action, which must be pleaded, and it is error to allow evidence of the value of the use and occupation where only damages are claimed in the complaint."§

I have thought it necessary to devote some space to the *complaint* being a *substitute* for the old *declaration* in ejectment, which was the leading process in the old action. And on this point C. J. Field said: "The decisions of the courts in respect to the necessary allegations of a *complaint in ejectment* have not been uniform, and perhaps on no one subject of pleading is there so much embarrassment felt by the profession in consequence."||

The Plea or Answer.—Under the regular action of ejectment, the defendant simply pleaded the general issue "not guilty," when meant not guilty of the trespass charged.

* Doe d. Gigner v. Roe, 2 Taunt., 397; 18 Johns, N. Y., 398; 10 Leigh, Va., 457.

† Adams v. Ames Iron Co., 24 Conn., 230.

‡ Vandevoort v. Gould, 36 N. Y., 639; Bell v. Medford, 57 Miss., 31; 24 Minn., 110; 53 Ind., 32; 61 N. Y., 382; Beard v. Federy, 3 Wall, 478.

§ Sedw. & Wait, Trial Title to Land, § 454, citing Larned v. Hudson, 57 N. Y., 151.

|| C. J. Field, in the case of Payne v. Treadwell, 16 Cal., 242. In this case some of the earlier cases in that State on this point were overruled. Judge Field, then Chief Justice of the Supreme Court of California, now one of the Associate Justices of the United States Supreme Court.

And in most cases, no doubt, this "general issue" is substantially adopted in the present practice in a purely simple action to try title to land. The action to recover land now, on the simple complaint and answer, contains all the elements of the old action of ejectment, and the title being directly involved, it is a test as to who has the best title, and then the possession follows the title; the same being enforced by the writ of possession, in case of the plaintiff's success. All defences may be given in evidence without special plea, and the defendant need not set up title in himself. The defendant or defendants under this general denial may prove facts tending to establish that the plaintiff is not vested with title or right of possession;* and if not a mere trespasser and intruder, may show an outstanding title in another at the commencement of the action without connecting himself with the same. The cases cited in the foot-note show the holdings of the different courts and the extent of the changes under the modern practice.

But it has been held, that if the defendant in the answer "merely denies the possession, and unlawful withholding of the premises, accompanied by an allegation that there has been no demand of the possession this does not put the plaintiff's title in issue, nor raise the question of adverse possession. To question the plaintiff's title, in such a case, the defendant must set up title in himself or out of the plaintiff."†

Effect of the Plea of General Issue on Question of Possession.—Say Sedwick & Wait in their recent work on *Trial of Title to Land*: "The authorities are not entirely uniform as to whether the plea of the general issue in ejectment admits or puts in issue the question of the defendant's possession. The general rule according to many cases is, that the defendant, by interposing this plea, admits himself to be in possession of the whole of the lands

* *Poffenberger v. Blackstone*, 57 Ind., 288; 59 Ind., 530; *Bruck v. Tucker*, 42 Cal., 346; *Black v. Tricker*, 52 Penn. St., 436; *Johnson v. Adleman*, 35 Ill., 265; *Raynor v. Timeson*, 46 Barb. (N. Y.), 518-526; *Styles v. Gray*, 10 Tex., 503; 32 Tex., 125; *Wicks v. Smith*, 18 Kan., 508; *Payne v. Treadwell*, 16 Cal., 242; *Wade v. Sanders*, 70 N. C., 277; *Harkey v. Houston*, 65 N. C., 137; 38 Mich., 725. See 13 N. W. Reporter, 390; 39 Mo., 569.

† *Sedw. & Wait, Trial of Title to Land*, § 478; *Ford v. Sampson*, 30 Barb., N. Y., 183; 17 How. Prac., N. Y., 447; *Wade v. Doyle*, 17 Florida, 522; 33 Cal., 505.

claimed in the writ or declaration, and that if he desires to dispute or controvert the question of possession, the proper method to accomplish that result is by special plea, in order to avoid this admission of possession.”*

But it is supposed that in the States where the code practice prevails, the possession of the defendant being a material allegation of the complaint must either be admitted or denied; that a failure to deny would be treated as an admission. “The answer must contain:” “1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.”† 2. “A statement of any new matter constituting a defence or counter-claim, in any ordinary and concise language, without repetition.”‡

As to pleading the statute of limitations in the answer, and the rulings in the different States, this discussion will be found in the chapter on Limitations.

Equitable Defences and Affirmative Relief.—The action of ejectment under the former practice could only be had upon the *legal* title to the land; the holder of the equitable title had to resort to a court of equity. And injunctions were frequently granted to restrain the action at law, pending the proceedings in equity.

But it is truthfully said: “The modern innovations in systems and forms of judicial procedure, especially the blending of legal and equitable jurisdictions, have wrought radical and highly important changes in the nature and uses of the statutory action of ejectment for the trial of controverted titles. The defendant may in many of our States, interpose equitable as well as legal titles

* Sedw. & Wait, § 479; Hill v. Hill, 43 Penn. St., 521; Bernard v. Elder, 50 Miss., 336; 6 Ga., 88; Stephens v. Griffith, 3 Vt., 448; 99 Mass., 7; 49 Me., 102. In North Carolina it is held that if the defendant in ejectment intends to disavow possession he should not enter any defence: McClennan v. McCleod, 75 N. C., 64. See Thomas v. Orrell, 5 Ired. Law, 569; Judge v. Houston, 12 Ired. Law, 108.

† Code of North Carolina, Battles' Revisal, ch. 17, sec. 100, sub. sec. 1.

‡ Ib., sub. sec. 2. This is about the same language used in the codes of New York, California, and other States, where the code system is adopted. Several of the States have taken the New York code as the model. As to the practice on this point in Alabama and Texas, see 60 Ala., 582; 51 Ala., 386; 20 Tex., 601; 47 Tex., 217.

or defences;* and when equitable defences are set up against legal titles, the same rule and measure of justice is applied as if the proceeding was in equity.†

The Equitable Defence must be Plead.—So if the plaintiff sues for the legal title, the defendant may resist by an equitable counter claim in the nature of a cross bill, and the answer must contain all the elements of a bill in chancery, and he must ask affirmative relief.‡

It is said that by interposing an equitable defence the defendant does not convert the legal action into an equitable one, nor change the right of the plaintiff to have his rights determined in the legal forum. This may present some difficulty.

The person bringing the action at law, cannot generally be compelled to sue any person except such as he may elect to prosecute. But the equitable defence frequently requires the presence of additional parties in the action, without whose presence an affirmative judgment, which would be *res adjudicata* upon the parties in interest, could not be rendered, and the plaintiff may refuse to bring them before the court.‡

No doubt the *power* and right conferred in *some* of these statutes to make *parties*, may obviate this difficulty to some extent. For instance, the North Carolina code provides: "In an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants; and any person claiming title or right of possession to real estate, may be made parties plaintiff or defendant, as the case may require, to any such action."§

* Sedw. & Wait, § 485; *Newsome v. Williams*, 27 Ark., 632; *Pope v. Cole*, 64 Barb., N. Y., 406; 68 Penn. St., 158; 17 N. Y., 270; 23 How. Pr., N. Y., 103; *McCauley v. Fulton*, 44 Cal., 355; 5 Tex., 22; 45 Ga., 17; 31 Tex., 448; *Pearsall v. Mayers*, 64 N. C., 549; *Jones v. Manly*, 58 Mo.; *Gaither v. Gibson*, 65 N. C.; 42 Cal., 346.

† *Phillip v. Gorham*, 17 N. Y., 270; *Hoppough v. Struble*, 60 N. Y., 430; *Lamont v. Cheshire*, 65 N. Y., 42; *Follett v. Heath*, 15 Wis., 601; *Conger v. Parker*, 39 Ind., 380; *Cramer v. Benton*, 60 Barb., N. Y., 216; *Lombard v. Cowham*, 34 Wins., 486; 35 Wins., 634; *Kentfield v. Hayes*, 57 Cal., 409; *Cadiz v. Mayors*, 33 Cal., 288; *Bruck v. Tucker*, 42 Cal., 346; *Williams v. Murphy*, 21 Minn., 534. See *ante*, "Complaint." Sedw. & Wait, Trial of Title, §§ 486, 487, 489, and cases cited. See codes of the several States.

‡ *Cramer v. Benton*, 4 Lans., N. Y., 291; *Call v. Chase*, 21 Wis., 511; Sedw. & Wait, § 488.

§ *Battles' Revisal*, ch. 17, sec. 61.

In section 65, of the same code, it also provides: "*When a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in.*"*

These sections 61 and 65 have undergone a judicial construction in North Carolina. Under the old law of ejectment the landlord had a right to come in and be made a party defendant. No other person had this right; and if a party should be permitted to defend as landlord, whose title is inconsistent with that of the tenant, the practice of the English court was to have the rule allowing him to defend, discharged with costs. And if this was neglected, and the party continue on the record as defendant, he would not be allowed to set up such inconsistent title on the trial.† The plaintiff might consent, when tenant has made default, for any person to come in and defend, but such person was required to admit that he shall be considered as actually in possession; because under the rule of confessing lease, entry, and ouster by the defendant, the plaintiff nevertheless was bound to prove the party sued in possession at the commencement of the suit.‡

The only person compelled to appear was Richard Roe. And under the construction placed upon these sections, it was held by the North Carolina courts that a third person who claims title, paramount and adverse to both plaintiff and defendant, should not be made a party under sections 61 and 65 of C. C. P.§

In *Wade v. Sanders*|| the court drew a distinction between an interest in the *controversy* and an interest in the "*thing*" which is the subject of controversy, and held that before the person was entitled to become a party he must be interested in the "*controversy*." In *Lytle v. Burgin*,¶ a third party claiming to be a joint owner with the defendant had a right to be admitted to defend.

* *Ib.*, sec. 65.

† *Adams*, 232; *Knight v. Lady Smythe*, 4 Maule & Sel., 347; *Wise v. Wheeler*, 6 Ired. Law, 196; *Davis v. Evans*, 5 Ired., 525.

‡ *Wise v. Wheeler*, 6 Ired., 196; *Adams' Eject.*, 357-8.

§ *Colgroove v. Koonce*, 77 N. C., 363. See also *Wade v. Sanders*, 70 N. C., 277.

|| *Wade v. Sanders*, 70 N. C., 277.

¶ *Lytle v. Burgin*, 82 N. C., 301.

In other cases,* it is held in North Carolina that the term "landlord" included all persons whose title was connected or consistent with the possession of the occupier, and that it was not necessary to have previously exercised acts of ownership.

And that the rule of the old action of ejectment, which restricted the defences of the landlord to such only as the tenant in possession could make, is changed. That such person, defending either as "landlord" or other "person" admitted to defend, has a right to make any legal defence which he may have. As said in *Isler v. Foy*, "Why allow a party to defend, and not allow him to make his defence after being admitted?"

In *Colgrove v. Kooner* it is held that, under section 65, the second paragraph, the court had a *discretionary* power to bring to it all parties necessary to a "complete determination of the controversy."

It would seem that the court could, therefore, exercise all the powers of a court of equity in requiring *parties* to be made.

The most usual instance of the equitable defence as against the legal title, is where a vendee in possession under a written valid contract to convey the same, can successfully resist the legal title, and can have a decree for specific performance. The matter must be specially pleaded with the allegations which, if stated in a bill of equity, would entitle the party to a specific performance. A sufficient allegation would be that he had fully performed his part of the contract by the payment of the purchase-money. And it would seem that as the relation of vendor and vendee is somewhat like that of mortgagor and mortgagee, trustee and *cestui que trust*, that the defendant might tender and offer to perform the contract, and if all the facts and circumstances are such that a court of equity would allow a *redemption* or *enforce* the trust, the court will give affirmative relief by compelling the vendor (plaintiff) to execute a deed. The vendor who sells land and executes title bond, and retains the title as security for the

* *Rollins v. Rollins*, 76 N. C., 264; *Isler v. Foy & Harrison*, 66 N. C., 547; *Colgrove v. Kooner*, *supra*.

In the old action of ejectment, no party but the landlord could defend except by the consent of the plaintiff after default of the tenant; neither could he set up any defence which the tenant could not: *Belfour and Henly's Heirs v. Davis and Nixon*, 4 Dev. & Bat. Law, 300. The plaintiff could not charge the landlord with his *own* trespass: *Carson v. Burnett*, 1 Dev. & Bat., 560.

purchase-money, stands as though he had *conveyed* and then took a mortgage as security, and is, therefore, in the position of the mortgagee, while the position of the vendee is that of mortgagor.* The vendor also holds the land in trust: first, for himself to secure the purchase-money; and, second, for the benefit of the vendee. And this equity can be set up as against the purchaser from the vendor with notice of the vendee's equity.†

Pleading a Special Title.—On this point Sedw. & Wait say: "It has been held in Texas, that where the defendant in trespass to try title, filed a special plea claiming title in himself, and setting it out specially, he should be confined in his defence to the title so pleaded, and the plea of not guilty, if also interposed, was held to be thereby waived.‡ By pleading specially, the defendant gives notice of his defence, and the plaintiff has the right to assume that the defendant will rely on none other, and ought not to be required to come prepared with evidence to meet other defences than those which the pleadings disclose,§ and he may plead specially, though his defence was equally available under the plea of not guilty.|| The pleadings must determine the relevancy of the evidence offered; for, even though unverified, they are professional statements by counsel of the claims of their clients, and the matters which they intend to prove.¶ In Oregon, if the defendant desires to claim title, or to avail himself of title in another, he must plead it specifically, and disclose its nature,** and when the defendant sets up title to an undivided interest, he must specify what share or interest he owns.†† It has been held in California, that an answer setting up title to only a portion of the demanded premises, must particularly describe the part to which title is claimed, and failing to do so, no evidence will be admitted under such pleading.‡‡ In New York, it has been held that a defendant is concluded by his answer setting up certain

* *Ellis v. Hussey*, 66 N. C., 501.

† *Pomeroy on Specific Performance*, p. 530; *Lyon v. Aiken*, 78 N. C., 258. As to who can *redeem* real property, see *Story's Eq. Jur.*, 1023; *Bell v. Cunningham*, 83 N. C., 328.

‡ *Custard v. Musgrove*, 47 Tex., 217.

§ *Shield v. Hunt*, 45 Tex., 424.

|| *Hollinsworth v. Holshausen*, 17 Tex., 41.

¶ *Wicks v. Smith*, 18 Kans., 508.

** *Phillippi v. Thompson*, 8 Oregon, 428; *Hall v. Austin*, 1 Deady, 104.

†† *Pease v. Hannah*, 3 Oregon, 301.

‡‡ *Anderson v. Fisk*, 36 Cal., 625.

chain of title from disputing the validity of the same title when asserted by the plaintiff.*

In a case in California the defendant admitted the possession in the answer, and averred that the defendant's "claim the fee," and then proceeded to deraign title under an administrator's sale. The administrator's sale was adjudged void. It was held that the averment that defendant's "claim in fee" merely meant that they had acquired title at the administrator's sale, and that it was not a denial of the plaintiff's title, except as predicated upon that fact; and the administrator's sale having been held void, the plaintiffs' title was adjudged to be admitted by the answer.†

Supplemental Answer or Plea Puis Darrein Continuance.—A transfer of the title, or a change in the relation of the parties frequently occur *pendente lite*, and to make these questions available, they should be brought before the court by an amended or supplemental pleading, setting up the additional facts and issues, or by the common plea *puis darrein continuance*.‡

A plea that the plaintiff had entered upon the lands described in the declaration and still retained the possession, has been held bad, and constituted no bar to the further prosecution of the suit.§

Reply to Affirmative Defence, Demurrers, etc.—The statutes, codes of procedure, and the adjudications of the different States are to be looked to, in regard to replications, demurrers, etc.; and as the same rules apply in real property trials as in others in regard to much of the pleadings, reference can only be made to the general principles of pleadings, and to the changes thereof by statute. Perhaps the holdings of the courts are not uniform, owing to the difference in statutes. Thus in Texas, where the defendant pleads the statute of limitations, it was held that the plaintiff, relying upon an exception in his favor to the running of the statute of limitations, should specially plead the exception by way of replication.|| "But this scientific and very ex-

* Sedw. & Wait, Trial Title to Land, § 492; *Henderson v. Scott*, 12 Week. Digest, N. Y., 363.

† *Pryor v. Madigan*, 51 Cal., 178; Sedw. & Wait, § 490.

‡ *Reily v. Lancaster*, 39 Cal., 354; *Jackson v. Ramsey*, 3 Cow., N. Y., 75; *Simmons v. Brown*, 7 R. I., 427; *Hardy v. Johnson*, 1 Wall., 371; *Thompson v. Red*, 2 Jones's Law, N. C., 412; 41 Mich., 52.

§ *Tyler v. Canady*, 2 Barb., N. Y., 160. But see *Thompson v. Red*, 2 Jones's Law, N. C., 412; Sedw. & Wait, § 495, and notes.

|| *Hughes v. Lane*, 25 Texas, 356.

acting rule of pleading, is not, however, of universal application."*

The rules and directions in regard to *replications* and *demurrers* are generally plain and specific in the recently adopted codes, and but little need be said here on these points. And where the code practice does not prevail, of course the rules of pleading at common law may be looked to as a guide.

The Verdict in Ejectment.—At common law, and before the statutory changes, if the plaintiff established his right to only a part of the land claimed, and there was a verdict for the whole, the judgment would go for the whole, but the plaintiff at his peril takes no more than he proved title to on the trial.† But the requirements of the verdict vary in the several States, and no uniform test can be furnished.‡

In some of the States in which the code is adopted, as North Carolina, for instance, there appears no directions as to the verdict in a trial for land; while in Tennessee and others, the statute prescribes certain requisites for the verdict. In Tennessee, the act of 1852 (part of the present code) provided that where the verdict was for only a part of the land claimed in the declaration, it must specify the same by metes and bounds, by reference to artificial objects or boundaries.

Among the first cases under the act of 1852 on this point, was *Loard v. Phillips*,§ in which the verdict "was for all the lands described in the declaration except that held for seven years by the defendant," and this was held to be void for uncertainty. If the verdict is for all the land claimed in the complaint or declaration, a general verdict for plaintiff is sufficient.

In South Carolina it was held that where the jury found "the land on which the defendant lives" was sufficiently definite.||

The courts have in some cases put a liberal construction upon

* Sedw. & Wait, § 493.

† *Paine v. York*, 10 Hump., Tenn., 340.

‡ Sedw. & Wait, § 497.

§ *Loard v. Phillips*, 4 Sneed, 566. In accord, *Brogan v. Savage*, 5 Sneed; *Van Fossen v. Pearson*, 4 Sneed, 362; *Miller v. Casselberry*, 47 Penn. St., 376; *Chapman v. Holding*, 60 Ala., 522; *Gregory v. Jackson*, 6 Mun. Va., 25; *Nolan v. Sweeny*, 80 Penn. St., 77; *Roberts v. Atwater*, 42 Conn., 266. As to verdict held insufficient, see 5 Watts Penn., 79; 43 Mich., 267; 35 Penn. St., 409; 80 Penn. St., 77; Sedw. & Wait, § 503.

|| *Manning v. Dove*, 10 Rich. S. C. Law, 395.

the verdict. Thus, in the Maryland Court of Appeals, the jury found "for the plaintiff, and assessed the damages at one cent." The court *construed* the verdict to mean, that the defendants were guilty of the trespass and ejection complained of in the declaration, and that the jury assessed the damages resulting therefrom to the plaintiff to be one cent.*

In Virginia the verdict was "for the plaintiff one cent damage," and the same was *construed* by the court and made to read, "We of the jury find for the plaintiff the lands in the declaration mentioned, and one cent damage."†

The Verdict must Specify the Nature of the Estate.—Several of the statutes require the verdict to specify the nature of the estate found, and if the verdict fails to do so it may be treated as a nullity.‡ This is necessary under the recent practice in which the action is not so strictly a possessory action, as under the old rules, the *title* being now *directly* in issue, and the judgment *conclusive* on the parties and privies.

In *Harkey v. Houston*§ it is strongly intimated by the Supreme Court of North Carolina, that under the present practice the only way to make a judgment in an action to recover land *conclusive*, is for the plaintiff to claim a *certain title* or *specified interest*; but that if the plaintiff only claims the *possession* and the defendant takes issue, then the only question is one of possession, and effectually a possessory action like the former ejection. And it would seem to follow that the verdict should follow the pleadings and specify the estate found, and also describe the land, in all cases where the verdict is for a part claimed in the complaint. The fiction having been abolished, and no special proceedings

* *Kershner v. Kershner*, 36 Md., 309-336.

† *McMurray v. Oneal*, 1 Call. Va., 246. See Sedw. & Wait, Trial Title to Land, ch. 19.

‡ *Van Fossen v. Pearson*, 4 Sneed, Tenn., 362; *Rivier v. Pugh*, 7 Heiskell, 715; *Rogers v. Sinsheimer*, 50 N. Y., 646; *Long v. Linn*, 71 Ill., 152; 15 Ill., 178. See *Hawley v. Twyman*, 24 Gratt. Va., 516, where the verdict was held *sufficient*, with this omission.

§ *Harkey v. Houston*, 65 N. C., 137; also *Falls v. Gamble*, 66 N. C., 455.

"It is conceded that legislative acts abolishing the fictions in actions of ejection do not abolish the action as such, nor convert it into a writ of right; it still remains an action of ejection, and falls under the rule of limitation applicable to that action." Sedw. & Wait, § 518; *Hogan v. Kurtz*, 94 U. S., 777-775 (as to District of Columbia).

prescribed for the action of ejectment, but simply a "civil action" for all civil remedies, it will be for the courts of this State to construe the action in accordance with the principles of law applicable to ejectment; which is, the tendency of the courts, as it was said in *Harkey v. Houston*, that it is not supposed that the legislature, in the abolishment of the *lease* and *fictions*, intended to surrender the advantages of the former action of ejectment. In *Falls v. Gamble* it is still more elaborately stated as to the requisites in the pleading to produce certainty and to operate as an estoppel.

Verdicts between Tenants in Common.—One tenant in common in order to a verdict in ejectment against his co-tenant, must show an *actual ouster*, which may be either forcibly or by a denial of the plaintiff's rights, and the assertion of an adverse title.*

Ouster is a question of fact for the jury, and it may be committed by a principal through an agent.† If the jury return a special verdict, actual ouster must be found to entitle the plaintiff to judgment.‡ Says a writer in reference to verdicts generally: "The courts frequently assist the jury in putting the verdict in proper form, by interrogating them as to their real intention, and suggesting the appropriate method of giving expression to it, or by calling their attention to informalities or elements of uncertainty in the verdict as tendered, and sending them back to further consider it. For this reason, errors in the form of verdict are of infrequent occurrence."§

Of the Judgment.—The point of chief importance, connected with the judgment in ejectment or in the action to recover land, is as to its peculiarities by way of estoppel on the parties to the

* *Barnitz v. Casey*, 7 Cranch, 456; *Norris v. Sullivan*, 47 Conn., 474; *Bethel v. McCool*, 46 Ind., 303; *Halford v. Tetherow*, 2 Jones, N. C. Law, 393; *Trappall v. Hill*, 31 Ark., 345; *Edwards v. Bishop*, 4 N. Y., 61; *Story v. Sanders*, 8 Hum., 663. See *Complaint—co-tenants*, authorities cited.

† *Munson v. Munson*, 30 Conn., 425.

‡ *Taylor v. Hill*, 10 Leigh (Va.), 457. See *Pierce v. Warnett*, 10 Ired. N. C. Law, 446; 7 Cranch, 456, *supra*; *Carpentier v. Mendenhall*, 28 Cal., 484.

§ *Sedw. & Wait* (Title to Land, etc.), § 505. In *Clarke v. Wagner*, 78 N. C., 367, the plaintiff claimed title and right to the possession. The answer of defendant denied possession and title in plaintiff; the jury fixed a certain line, but they did not find that defendant was in possession of the part thus given to the plaintiff, and no *wrongful possession being found*, the plaintiff was held not entitled to judgment for costs or damages.

action. It is familiar learning, that in personal actions the litigant shall not be twice vexed for the same cause.

And the following is the *test* as to the conclusiveness of a judgment. If the evidence which will sustain the second action would have authorized a recovery in the first action, under the allegations of the complaint, the first judgment is an absolute bar to the recovery in the second action.*

It is not sufficient that the transactions involved in and giving rise to the two actions are the same; the causes of action must be identical to the extent that the same evidence will support both actions. The forms of the action may be different and the causes of action still the same; that is, the same evidence may be available to support either action.† The judgment is equally conclusive upon the parties in a second action depending upon the same questions involved in the first action, although the subject-matter of the second action may be different.‡ A judgment for the defendant, in an action of trover, may bar an action of *indebitatus assumpsit* for the value of the same goods, but to constitute a bar it must appear that the question of property was passed upon in the first action.§

A difference in the form of the action will not prevent the application of the estoppel;|| nor is the estoppel avoided by the fact that the first judgment was rendered upon erroneous grounds.¶

The courts have gone so far as to hold that the judgment is an estoppel, not only as to the matters which were actually determined, but as to every other matter which the parties might, with reasonable diligence, have litigated and had decided in the former action, either as matter of claim or defence.**

Judgment in Real Actions.—A judgment upon a writ of right,

* *Stowell v. Chamberlain*, 60 N. Y., 272; 77 N. Y., 498.

† *Rice v. King*, 7 Johns, N. Y., 20; 60 N. Y., 272; 45 Ala., 262; 42 Cal., 367.

‡ *Castle v. Noyes*, 14 N. Y., 329.

§ *Union R.R. and T. Co. v. Traubes*, 59 Mo., 355–362.

|| *Ware v. Percival*, 61 Me., 391; *Washburn v. Great Western Insurance Co.*, 114 Mass., 175.

¶ *Morgan v. Plumb*, 9 Wend., N. Y., 287; 77 N. Y., 498; *Sedw. & Wait*, § 507, and cases cited.

** *Jordan v. Van Epps*, 85 N. Y., 427; 26 Ala., 504; *Foster v. Evans*, 51 Mo., 39; *Sedw. & Wait*, § 508. See "*Estoppel*," *supra*. *Doake v. Wiswell*, 33 Me., 355.

the highest and most important of the real writs, was final, and a complete estoppel. But a judgment rendered upon an inferior writ was not an estoppel upon a writ of a higher degree or nature, because the superior writ establishes rights additional to those conferred by an inferior writ.*

The Judgment in the Technical Action of Ejectment not Conclusive.—It is well understood that a judgment in the technical action of ejectment was not conclusive. Mr. Adams says: "It is therefore obvious that the judgment can never be final, and that it is always in the power of the party failing, whether claimant or defendant, to bring a new action."†

The reasons given for the inconclusiveness in the judgments in ejectment are stated in a late case in the Supreme Court of the United States, by Mr. Justice Grier:‡ "As the title of the freehold was never formally and directly in issue by the pleadings, but only a trespass committed by John Doe or Richard Roe, in forcibly expelling him from a term of years, no verdict between these parties for the supposed trespass could be pleaded in bar to another action of trespass by Thomas Troublesome or Timothy Peaceable. It was in this way that the doctrine crept in that a verdict and judgment were conclusive only as regards personalty. Afterwards when this fictitious scaffolding was demolished in many of the States, and the parties made their issue in their own names—where there could be no difficulty as to the estoppel—the idea of a difference between rights to real and personal property still continued in many States to linger, and a single verdict and judgment in ejectment was not considered conclusive. In such States provision was usually made by statute for a second trial." Under this action, the right of property, too, might be in one person, the right to the possession in a second, and the actual possession in a third; and hence, a judgment for the possession did not of necessity conclude the title.

In Connecticut, it was held that a former judgment for the defendant, in an action for disseizin on the issue of no wrong disseizin, was not an estoppel as to the plaintiff's title, as the

* *Stearns on Real Actions*, and *Jackson on Real Actions in Massachusetts*.

† *Adams' Eject.*, 420 (4th Am. Ed.).

‡ *Sturdy v. Jackaway*, 4 Wall., 174; *Blanchard v. Brown*, 3 Wall., 245; *Hogan v. Kurtz*, 94 U. S., 775; *Miles v. Caldwell*, 2 Wall., 35.

judgment might have been rendered upon the ground that the defendant was not in possession, or other grounds not involving the title.*

But now the action is divested of fictitious parties, and the title to land may be placed directly in issue. As to whether the verdict and judgment shall operate as an estoppel under this changed practice the decisions are not in complete harmony.

Thus the courts of Missouri and Alabama have decided that the judgment is not conclusive.† The decision in Alabama was, doubtless, based upon the peculiar legislation of that State in reference to this action. The law of that State abrogating the fictions, among other things, provided that "the laws now in force in relation to the action of ejectment, except in so far as it relates to fictitious proceedings therein, shall be applied to the action of trespass to try titles." So the action of ejectment is practically retained in Alabama, except the action is in the nature of trespass to try title.

But the decided weight of authority is in favor of *holding the judgment conclusive in ejectment as other actions where the issue is made in the names of the real parties in interest.*‡

In Illinois and some others of the States, the acts prescribing the law for actions of ejectment, in express terms make the verdict and judgment *conclusive* as in personal actions.

In the case of *Gamble v. Falls*,§ C. J. Pearson uses the following language as to the effect of the code, then but recently adopted, which is taken mostly from the New York code: "Under the Code of Civil Procedure, in an action for land, where the complaint avers title in the plaintiff, the answer admits possession and denies the title of the plaintiff, and sets up title in the defendant, a verdict and judgment will conclude the parties. So the action for land under the code differs in this respect from an action of ejectment where there is no bar. In an action for land

* *Smith v. Sherwood*, 4 Conn., 276. See *Oetgen v. Ross*, 54 Ill., 79.

† *Kimmel v. Benna*, 70 Mo., 52; *Camp v. Forest*, 13 Ala., 114.

‡ *Sedw. & Wait*, § 524; *Sheridan v. Andrews*, 49 N. Y., 478; *Sheridan v. Linden*, 81 N. Y., 182; *Caggar v. Lansing*, 64 N. Y., 417; 10 Nevada, 19; 47 Cal., 542; *Stephens v. Hughes*, 31 Penn. St., 381; *Blanchard v. Brown*, 3 Wall., 245; *Doyle v. Hallam*, 21 Minn., 515; 3 Nev., 21; *Marshall v. Shafter*, 32 Cal., 176-198; 44 Vt., 500.

§ *Gamble v. Falls*, 66 N. C., 445, citing *Harkey v. Houston*, 65 N. C., 137.

the plaintiff, if he does not wish the action to try title, should merely allege that he is entitled to the possession, and that the defendant withholds it to his damage; and if the defendant does not wish the action to conclude the title, he should, in his answer, merely deny the allegations of the complaint, so as to make it in effect a plea of not guilty, or 'general issue.'"

So it was argued in the same case, that in an action of trespass, in which the complaint avers title, and the answer admits the possession, and denies title, it is like the former action of *trespass quare clausum fregit*, in which the plea was *liberum tenementum*, in which the judgment was conclusive. The Code Commission, in 1868, in their report, admitted that no proceedings, specially adapted to the action of ejectment, had been incorporated into the code of North Carolina. And with some of the profession it has been a matter of regret, but it is believed that the law can be better administered in the light of the well-established principles of the law of ejectment. Indeed, those States, as for instance, Alabama, Tennessee, and Illinois, where the legislature has professed to provide a specific action and mode of procedure, it is but little more than the affirmance of long-established rules of practice and principles of law applicable to the trial of the right to the possession of land. With these changes the procedure is still called *ejectment*. Mr. W. H. Bailey in his recent excellent Digests of the North Carolina cases, calls the procedure "*an action to recover land*," and it is so styled in the recent reports of the State, but there is no good reason why it should not be called an "*action of ejectment*." It is true, that under the code, "the distinction between actions at law and suits in equity, and the forms of all such actions and suits, shall be abolished, and there shall be but one form of action, which shall be denominated a '*civil action*,' but the action of ejectment stripped of its 'forms' and 'fictions' remains as before."

In 1870 the Congress of the United States, for the District of Columbia,* abolished the fictions in an action of ejectment, and authorized the suit to be brought in the name of the real party in interest. Under this act it was contended in the case of *Hogan v. Krutz*,† that the effect of this *change* was, to convert the action

* June 1st, 1870, 16 Stat. U. S., 146.

† *Hogan v. Krutz*, 94 U. S., 773.

of ejectment into a *real action*, and, therefore, the same statute of limitations was not applicable; but the Supreme Court of the United States took the view, which has generally been had in the States, that a mere change of "forms" and the dispensing with "fictions" did not destroy the action of ejectment.

And so it was held that twenty years' adverse possession in the District of Columbia being a bar to the old action, it is a bar still, the changes made by the act of Congress notwithstanding.

As has been shown, the Supreme Court of the United States has uniformly held that the reason why the judgment in the old ejectment was not an estoppel, was because of the "fictitious" forms of the action, but, with the same uniformity, they have held that when these fictions have been abolished, and the title put directly in issue, under the appropriate pleadings, the judgment is equally conclusive with judgments in other cases.

After-acquired Title.—While the judgment is *conclusive*, it must not be forgotten that it is only in cases where the title and defences are precisely alike, the judgment being conclusive only upon the title established in the action.* Thus, in *Barrows v. Kindred*,† the plaintiff failed in the first action because the power of attorney conveyed no title, but subsequently the plaintiff did obtain the title, and brought suit, and the action was sustained. And in *Merryman v. Bourne*,‡ the party in the first suit relied upon the title made by the *Alcalde*, or chief of the Pueblo of San Francisco, and the party obtaining no title for the want of authority in the *Alcalde*, failed in the suit; but, *subsequently*, he did obtain the true title, and brought suit, and the former action was held as no estoppel.

The after-acquired title is not involved in the former trial, merits not in issue.

* *Foster v. Evans*, 51 Mo., 39; *Chose v. Irvin*, 87 Penn. St., 286; 79 N. Y., 398; *Bank v. Bridges*, 11 Rich. S. C. Law, 87.

† *Barrows v. Kindred*, 4 Wall. U. S., 399.

‡ *Merryman v. Bourne*, 9 Wall., 592. In accord, 2 Wall., 35; 4 Wall., 174; *Cromwell v. County of Sac*, 94 U. S., 351; 35 Wins., 27; 40 Cal., 294; 4 Cow. N. Y., 559. As to the reasons for the estoppel, by judgment generally, see *Cromwell v. County of Sac*, 94 U. S., *supra*; *Lord Ellenborough*, in *Outram v. Morewood*, 3 East, 346; *Duchess of Kingston's Case*. (Lead. Cas.)

When the Landlord is not Bound.—It is usual to make the tenant or party in possession a defendant in ejectment.* The judgment against the tenant is binding on him, but it does not bind the landlord, who is not made a party, and who has not had an opportunity to make defence.†

In a recent case, in New York, it was decided that the landlord is not bound by the judgment, although the tenant gave him notice, and he refused to apply to the court to become a party.‡

In ejectment, the judgment is conclusive against the parties named, and those claiming under them, but the landlord cannot be said to claim under his tenant; the converse of the proposition is true. Under the practice in New York, North Carolina, and most of the States, now, the landlord may be joined with the tenant by the plaintiff when he brings the suit, and of course, then, the judgment would constitute an estoppel against him.

But, if the plaintiff omit to make the landlord a party defendant, and the landlord refuses to have himself made a party, the judgment will not bind him.§

If, however, the landlord in an action of ejectment against the tenant assumes charge of the defence, and puts his title in issue, the judgment should bind him by way of estoppel, as though he had been formally made a party.||

And in this instance, where the landlord takes charge of the defence, exhibits his title, employs counsel, and, although not a formal party, he is liable to the plaintiff for mesne profits and damage, and especially so if he has actually received the rents pending the litigation, he thus makes himself the active party in the obstruction to the assertion of the plaintiff's rights, and is the person from whose wrong the damage directly results to the plaintiff. It has been held that where the landlord receives the

* *Rogers v. Bell*, 53 Ga., 94; 28 Cal., 534; 32 Arkansas, 304; *Betz v. Mullin*, 62 Ala., 365; *Albertson v. Reding*, 2 Murph. N. C., 283; 1 Mich., 14; 83 Ill., 109; 47 N. Y., 493; *Ward v. Parks*, 72 N. C., 452; 54 Ala., 300; 5 Hill, N. Y., 48.

† *Lowe v. Emerson*, 48 Ill., 160; 49 Cal., 213; 45 Cal., 519.

‡ *Bennett v. Leach*, 25 Hun. N. Y., 178; *Sheridan v. Andrews*, 49 N. Y., 484; *Boles v. Smith*, 5 Sneed, Tenn., 105.

§ 12 N. Y., 580; N. C. Code, Sedw. & Wait, § 539.

|| *Valentine v. Mahoney*, 37 Cal., 389; *Russell v. Mallon*, 38 Cal., 259.

possession from the tenant, pending the ejectment, he will be bound by the recovery against the tenant, and that the plaintiff may evict him under the writ of possession.*

Parol Evidence is Admissible to Show the Precise Title Adjudicated.—It is well settled that when it is necessary to show the precise matter involved, or what particular title was tried, parol evidence is admissible. In reference to ejectment, then, in order that the judgment in one suit shall be a bar to another, the titles and defences must be precisely the same. The record itself contains no recital of the title, and the real question is, what is decided in the former action, and this may be shown by parol. The general doctrine, with the reasons, may be found in the footnote.†

The Judgment should Specify Particular Estate.—The judgment in ejectment should follow and conform to the verdict in designating the extent of the interest recovered, and must be rendered for the premises described in the complaint, and must follow the complaint in respect to the description of the lands, and as to the plaintiff's estate or interest in the premises.‡

If the land be subject to an easement for public use, the owner of the fee may recover in ejectment, subject to such easement, servitude, or use. So a judgment may be rendered for land sub-

* *Hanson v. Armstrong*, 22 Ill., 442; *Sampson v. Ohleyer*, 22 Cal., 200; *Smith v. Gayle*, 58 Ala., 600; *Rogers v. Bell*, 53 Ga., 94.

The judgment against a government agent is not conclusive on the government. The government cannot be sued except by its own consent. It requires an act of Congress to direct proceedings against the government. *Carr v. United States*, 98 U. S., 433; 11 Abb. Pr. N. Y., 97; *The Siren*, 7 Wall., 152; *The Davis*, 10 Wall., 15; *Campbell v. James*, vol. xxi. Pat. Office Gazette, 337.

† *Cromwell v. County of Sac*, 94 U. S., 35; *Wood v. Jackson*, 8 Wend., 9; *Briggs v. Wells*, 12 Barb. N. Y., 567; *Sturdy v. Jackaway*, 4 Wall. U. S., 174; *Outram v. Morewood*, 3 East, 346; *Duchess of Kingston's Case*, 79 N. Y., 398; *Borger v. Hobbs*, 67 Ill., 592; 3 Nevada, 21; 5 Lansing, N. Y., 222; 10 Wend. N. Y., 80; *Packet Co. v. Sickles*, 5 Wall., 580; 64 Ala., 299; *Foster v. Evans*, 51 Mo., 39 (decided in 1872). This case is repugnant to the subsequent holding in *Kimmel v. Benna*, 70 Mo., 65; but the latter case, in holding the judgment in ejectment not an estoppel, is not sustained by the general authorities, even in the State of Missouri.

‡ *Sedw. & Wait*, ¶ 497, ¶ 525, ¶ 535; *Meraman v. Caldwell*, 8 B. Mon. Ky., 32; 1 Scam. Ill., 240; 18 Wis., 447; *Loard v. Phillips*, 4 Sneed, 566; *Brogan v. Savage*, 5 Sneed, Tenn.; 50 N. Y., 646; *Swan v. Stephens*, 99 Mass., 7; *Koon v. Nichols*, 63 Ill., 163. The statutory requirement must be followed.

ject to a homestead.* In such cases, the judgment should define the nature and extent of the claimant's interest.†

In New York the action of ejectment tests and settles, not only the right to the possession, but the title under which the right exists, whether in fee, for life, or for years.‡

It is provided in the statute of New York that a judgment by *default* in ejectment shall not be considered conclusive upon the title against persons claiming under the defendant, unless the judgment has been docketed for three years.§

The Relief Prayed.—A complaint alleging seizin, and right of possession in the plaintiff, with the averment of the wrongful entry and possession by the defendant, and with the simple prayer demanding the possession and damages, is a simple action of ejectment, and a plaintiff under a complaint of this nature is not entitled to a judgment restraining the unlawful interference with a right incident to property in possession, such as projecting a cornice over the plaintiff's premises.|| Of course, in proceedings, with the pleadings shaped for that purpose, the title to land may be established in equity, and restraining orders from interfering with the possession may be had.¶

Form of the Judgment in some of the States.—In case the defendant pleads not guilty (under the practice in Texas), and asserts title in himself, a general verdict for the defendant only authorizes a general judgment for the defendant, and a judgment decreeing title to defendant, and cancelling plaintiff's claim as a cloud, was held to be erroneous.** So in California it is held that the plaintiff cannot ask that he be adjudged the owner, etc., and that the defendant be enjoined from claiming title. For the plaintiff asks to be put in possession, and he has adopted this remedy, and for his protection in the future he must rely upon the judgment as a bar.†† But it must not be forgotten that the

* Taylor v. Gladwin, 40 Mich., 232; Castle v. Palmer, 6 Allen (Mass.), 401.

† Rogers v. Gensheimer, 50 N. Y., 646.

‡ Cagger v. Lansing, 64 N. Y., 417; Sheridan v. Linden, 81 N. Y., 182.

§ 2 R. S., N. Y., 309, ¶ 38.

|| Vroman v. Jackson, 6 Hun. N. Y., 326; 39 Barb., N. Y., 400.

¶ See Complaint. Broiestedt v. South Side R.R. Co., 55 N. Y., 220; Sedwick & Wait (Title to Lands), § 523.

** Johnson v. Newman, 35 Texas, 166; Sedw. & Wait, ¶ 543, § 544-545, and cases cited.

†† Doyle v. Franklin, 40 Cal., 106.

pleadings may be shaped with a view of equitable relief by the plaintiff, and of affirmative relief by the defendant.

Habere Facias Possessionem.—The writ of possession is the ultimate process through which the successful plaintiff secures the fruits of his victory, and by which the judgment is made effectual. This writ is the authority to the sheriff or marshal to remove the defeated party or parties, and to place the plaintiff or his agent in possession.

If opportunity presents itself, the successful party may take peaceable possession without the aid of the writ; the judgment being a complete protection to the plaintiff against an action for trespass.*

The defeated party might, of course, give up the possession willingly, or the lands might not be actually occupied.

This writ must follow the terms of the verdict and judgment, and is usually addressed to the sheriff of the county in which the lands are situate, and in which the land is described, and commands him to deliver the possession of the same to the party entitled to it. The statutory regulations as to the return day are supposed to be known to the sheriff, which he must observe.

The practice under the common law was, when the declaration, verdict, and judgment described the land in very general terms, the plaintiff might take possession of the lands at his peril, subject to be put right by the court if he took possession of more land than was authorized by the subject-matter of the controversy.† In reference to this practice it has been pertinently said: "The propriety, however, of arming a claimant with court process, and furnishing him an officer empowered to take possession of any lands which the claimant's caprice or cupidity might prompt him to point out, was open to the most serious objections."‡ The practice was not universal. But under the more modern practice, the verdict must describe the lands with sufficient certainty, and the writ of possession following the ver-

* *Witbeck v. Van Rensselaer*, 64 N. Y., 27-31; 22 Penn. St., 378; 5 Ohio, 509; *People v. Cooper*, 20 Hun. N. Y., 486; *Smith v. Hornback*, 3 A. K. Marsh (Ky.), 392; 66 Penn. St., 210; 12 Cush. Mass., 433; *McNeil v. Bright*, 4 Mass., 282-300; 99 Mass., 33.

† *Johnson v. Nevill*, 65 N. C., 677; *Camden v. Haskil*, 3 Rand. (Va.), 462; *Doe v. Wilson*, 2 Starkie, 477; 16 Mass., 191.

‡ *Sedw. & Wait*, 554.

dict and judgment, the abuses of the old rule are mostly obviated.

Execution of the Writ—When Complete.—It is the duty of the sheriff or marshal, first to turn out the occupants, then take possession in the name of the law, and afterwards deliver the vacant possession to the plaintiff in ejectment. The officer has all power necessary to accomplish its complete enforcement; he may break open doors and windows, and employ adequate force to overcome resistance.* And, if necessary, may remove personal property.†

It would seem that the execution of the writ might be considered complete when the sheriff has put the tenant (where there is a house) out of the house, and the plaintiff into the same. And, certainly, after having delivered full possession to the plaintiff or his agent, and left.‡

What Parties may be Evicted under this Writ.—The sheriff will be required not only to remove the defendant named in the writ, and his family and employes, but also any and all persons who have entered upon the land pending the litigation, whether as trespassers or claiming to hold in the right of the defendant, or under the title which was adjudicated in the action.§

It has been a debatable question as to whether, under this general doctrine, the wife of the defendant who claims title to the land can be evicted. The courts of Pennsylvania, in the case of *Johnson v. Fullerton* (cited in note), held that this rule justified the sheriff, while executing the writ, to remove the wife of the defendant from the land, though she put forth a claim of independent title in herself. The court held that it was the duty of the husband and head of the family to defend the possession of the family, and, failing to do so, the family must go with him. But the court conceded that the title of the wife cannot be affected

* *Adams Eject.* (4 Am. ed.), 412; *Crocker on Sheriffs*, § 573; 3 *Coke*, 188; 1 *Dana* (Ky.), 605; 4 *Cush.* (Mass.), 302.

† *People v. Cooper*, 20 *Hun. N. Y.*, 486.

‡ *Farnsworth v. Dowler*, 1 *Swan* (Tenn.), 1; 10 *B. Mon.* (Ky.), 370; 64 *N. Y.*, 27; *Doe & Smallwood v. Bilderback*, 1 *Harris, N. J.*, 497; *Kingsdale v. Mann*, 1 *Salk.*, 321.

§ *Mayne v. Jones*, 34 *Cal.*, 483; *Jackson v. Tuttle* 9 *Cow. N. Y.*, 233; *Howard v. Kennedy*, 4 *Ala.*, 592; *Hickman v. Dale*, 7 *Yerg.* (Tenn.), 149; *Wallen v. Huff*, 3 *Sneed*, 82; *Johnson v. Fullerton*, 44 *Penn. St.*, 466; *Long v. Morton*, 2 *A. K. Marsh* (Ky.), 39.

by the judgment against her husband alone, but only the possession.

This case is sharply criticised by Sedwick & Wait, in their work on the Trial of Title to Land. They say: "Is the wife to be prejudiced by the breach of duty of the husband in failing so to do, and is she to forfeit her possession in obedience to a judgment rendered without notice to her, and upon a title under which she does not claim to hold? . . . If the wife is deforced of the possession, she will be compelled to become plaintiff in ejectment, and thereby lose the vantage-ground which the possession conferred."* Under the recent legislation in favor of married women it would seem that the decision in *Johnson v. Fullerton* could not be sanctioned. It has been decided that if the landlord is not made a party, and he fails to have himself made a party, the judgment against the tenant is no estoppel. The effect of which holding is, the landlord is not *bound* to make himself a party. Now is the wife *bound* to make herself a party or lose the possession, if judgment goes against the husband? Most generally the plaintiff would make the wife a party, knowing that she claimed the land, or if he failed to do so, the wife would ask permission to become a party of record and set up her title either in law or equity. *Prima facie*, all parties who come into the possession after suit brought enter in subordination to the defendant's title; but the facts may be shown, and if the party come in possession under an adverse and paramount title he is not liable to be evicted; if he should be, his best remedy is to obtain a writ of restitution, or apply to the court to be excepted from the operation of the writ of possession.†

The sheriff should also place the plaintiff in possession of all fixtures and improvements on the land. It is a principle of law

* Sedwick v. Wait, § 560. In California it is held that the wife who claimed in her own right and as her separate property, could not be dispossessed under a writ against the husband, she not being a party to the suit. *Levis v. Hicks*, 38 Cal., 334.

† *Smith v. Pretty*, 22 Wis., 655; *McCord's Heirs v. McClintock*, 5 Litt. Ky., 304; *Sedwick v. Wait*, § 562. As to the test, in cases of this kind, and when eviction should or should not take place, see *Powell v. Lawson*, 49 Ga., 290; 31 Cal., 333; 25 Mo., 47-53; 10 Allan (Mass.), 133; 4 Ala., 592; 38 Texas, 396; *Kelley v. Fritz*, 11 Heisk. (Tenn.), 7; *Terrel v. Allison*, 21 Wall., 289; *Howard v. Railroad Co.*, 101 U. S., 837-849; 41 Cal., 501.

that the disseizor, when obliged in law to yield the possession, must surrender the land in its improved state.

The Growing Crops.—The rule is that the party recovering in ejectment is entitled not only to the soil, but to the growing crops on it and constituting a part of it. After judgment the defendant is considered a trespasser from the date of the demise of the land in the declaration. If he has not harvested the crops he has no right to do so; and if the same have been harvested the successful plaintiff, in the action for mesne profits, can recover the value.

So, if a tenant sows a crop during the pending of ejectment against his landlord, and with notice of the pendency of the suit, he has no right to enter after having surrendered the possession, and cannot remove the crops sown. And if the defendant in ejectment, after the execution of a writ of possession, enters, cuts, and removes a crop, the plaintiff in ejectment may recover its value from him in trover.* See footnote as to the "*Law in Relation to Crops.*"

But the sheriff cannot seize upon products, such as fodder stacked, or pease and beans gathered and stored before the writ issued. *Brothers v. Hurdle, supra*, and *Ray v. Gardner, supra*.

An interesting article, by Henry Wade Rogers, Esq., appeared in the *Southern Law Review*, for October and November, 1882, on "*The Law in Relation to Crops,*" and being a question of every-day practical utility, the author thinks it proper to give the same in a note. It defines the law in relation to crops, not only as between the litigants in ejectment, but as between *vendor* and *vendee*, *mortgagor* and *mortgagee*, *statute of frauds*, *labor's lien*, etc. The article is quite valuable.†

* *Alters v. Hickler*, 56 Ill., 275. As to the general rules on this question, see *McLean v. Bovell*, 24 Wis., 295; *Rowell v. Klein*, 44 Ind., 290; *Brothers v. Hurdle*, 10 Ire. N. C. Law, 490; *Adams on Ejectment*, 416 (4th Am. ed.); *Lane v. King*, 8 Wend. N. Y., 584; *Ray v. Gardner*, 82 N. C., 454; *Walton v. Jordon*, 65 N. C., 176.

† *The Law in Relation to Crops—Fructus Industriales.*—It is well known that a fundamental distinction is taken between fruits, produced by the annual labor of man in sowing and reaping, mowing and cultivating, and such as constitute the natural growth of the soil. That corn, wheat, oats, barley, potatoes, etc., being *fructus industriales*, are considered as the representatives of the labor and expense bestowed upon them, and regarded as chattels; while grass, trees, fruit

The Duty of the Officer Defined.—Mr. Justice Field, of the United States Supreme Court, sitting as a Circuit Judge, in a

on trees, being *fructus naturales*, are, in contemplation of law, a part of the soil of which they are the natural growth.

This distinction was fully and clearly taken in the noted and leading cases of *Evans v. Roberts*.¹ The facts in that case were that a verbal contract had been made for the sale of potatoes not yet dug, and the objection was made that the agreement was void, on the ground that it was a contract of sale of an interest in or concerning land, within the meaning of the statute of frauds. The objection, however, was not sustained, and Mr. Justice Bayley distinguished the case of *Crosby v. Wadsworth*,² which involved the sale of growing grass. He said: "In that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *feri facias*; it goes to the heir, and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold,³ and may be taken in execution under a *feri facias* by which the sheriff is commanded to levy the debt of the goods and chattels of the defendant." This case was decided in 1826, and established the doctrine that a contract of sale of *fructus industriales* was not a contract of sale of any interest in or concerning land, within the meaning of the fourth section of the statute of frauds. But the distinction, so clearly and satisfactorily stated in the case we have considered, is one that was taken in the earliest times. It was stated by Chief Justice Hobart, in the early and oft-quoted case of *Grantham v. Hawley*⁴ (13 Jac. Rol., 3131), and his language shows that the distinction was then well known between the "*natural fruits,—as of grass or hay, which ran merely with the land,*"—and the *fructus industriales*, adding that corn is "*fructus industriales*"; so that he that sows it may seem to have a kind of property *ipso facto* in it divided from the land, and therefore the executor shall have it, and not the heirs." The case of *Evans v. Roberts* is therefore not important as taking for the first time the distinction between *fructus naturales* and *fructus industriales*, but it has nevertheless been considered as of the greatest importance, as establishing the doctrine that a sale of *fructus industriales* is not a sale of an interest in land, within the meaning of the statute of frauds. Upon the authority of that case that doctrine has been generally recognized and adopted, both in England, in Ireland, and in this country.⁵

¹ 5 Barn. & Cress., 836.

² 6 East, 602.

³ Com. Dig., tit. Biens, G.

⁴ Hob., 132.

⁵ *Jones v. Flint*, 10 Ad. & E., 753; *Dunne v. Ferguson*, 1 Hayes, 541; *Whipple v. Foote*, 2 Johns., 422; *Stewart v. Doughty*, 9 Johns., 112; *Austin v. Sawyer*, 9 Cow., 39; *Cutler v. Pope*, 13 Me., 377; *Bryant v. Crosby*, 40 Me., 9, 21; *Buck v. Pickwell*, 27 Vt., 157; *Ross v. Welch*, 11 Gray, 235; *Kingsley v. Holbrook*, 45 N. H., 313, 318; *Howe v. Batchelder*, 49 N. H., 204, 208; *Marshall v. Ferguson*, 23 Cal., 65; *Purner v. Piercy*, 40 Md., 212; *Davis v. McFarlane*, 37 Cal., 634; *Bernal v. Hovious*, 17 Cal., 541; *Graff v. Fitch*, 58 Ill., 377; *Bull*

comparative late case, said: "Persons entering after suit by title existing previously adverse to that of the parties stand in a

While, on the other hand, a contract for the sale of growing crops, *fructus naturales*, is governed by the fourth section of the statute of frauds, if it provides for vesting an interest in the vendee before a severance of the crops from the soil.¹ As to the distinction between *fructus naturales* and *fructus industriales*, it is to be remarked that a growing crop of grass, even if grown from the seed, cannot be regarded as *fructus industriales*, for this reason: that it cannot be distinguished from the natural product.² Of course, when the agreement is for the sale of an interest in lands, under that section of the statute of frauds it is necessary that the agreement, "or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." On the other hand, if the agreement for the sale of *fructus industriales* is an agreement for the sale of "goods, wares, and merchandise," within the meaning of the 17th section of that statute, then it is necessary that the agreement should be in writing if the value is over a specified amount, unless there has been a payment made or an acceptance of a part of the goods.³

The general rule is, that while as between vendor and vendee, and as against strangers and trespassers, the title to personal property passes without delivery, yet as against subsequent purchasers and attaching creditors an actual or constructive delivery is essential to the validity of the sale.⁴ But while the general policy of the law will not permit the owner of personal property to sell it, and still continue in possession of it, it is necessary that the rule be somewhat modified in the case of a sale of growing crops. To require the purchaser of growing crops to take manual possession of them before the time to harvest comes, would be to practically deny the right of the owner to sell such crops until harvest time. The latest case we have been able to find in which this question has been considered is the case of *Ticknor v. McClelland*,⁵ decided in the Supreme Court of Illinois. In that case there had been a sale of standing corn, which was afterwards levied on as the property of the vendor and sold at execution sale. But the court held that in case of the sale of standing crops, the possession is in the vendee until it is time to harvest them, and

v. Griswold, 19 Ill., 631; *Bellows v. Wells*, 36 Vt., 600; *Barson v. Browder*, 2 Lea, 701.

¹ *Rodwell v. Phillips*, 9 Mee. & W., 502; *Crosby v. Wadsworth*, 6 East, 602; *Campbell v. Roots*, 2 Mee. & W., 248.

² *Reiff v. Reiff*, 64 Pa. St., 134. And see 1 Will. on Ex'rs, 783.

³ *Benj. on Sales*, sect. 114.

⁴ *Ludwig v. Fuller*, 17 Me., 162; *Vining v. Gilbreth*, 39 Me., 496; *Fairfield Bridge Co. v. Nye*, 60 Me., 372; *Packard v. West*, 4 Gray, 307; *Mt. Hope Iron Co. v. Buffington*, 103 Mass., 62; *Thorndike v. Bath*, 114 Mass., 116; *Haak v. Lindermann*, 64 Pa. St., 499; *Ticknor v. McClelland*, 84 Ill., 471, 474; *Webster v. Granger*, 78 Ill., 230, *Lewis v. Swift*, 54 Ill., 436; *Morgan v. Taylor*, 32 Texas, 363.

⁵ 84 Ill., 471.

different position. Their title is in no respect affected by the judgment. But the determination of the question, whether the

that until then he is not required to take manual possession of them. Such is undoubtedly the proper view to take of this question, so far as the validity of the sale is concerned. Strictly speaking, however, we doubt the correctness of saying that the possession is in the vendee. "We know of no rule or principle of law by which the possession of a crop growing upon land can be separated from the land, so as to place the possession of the land in one, and the crop in another. The crop while growing is attached to and composes part of the land, and must necessarily be in the possession of whomsoever the land is possessed."¹ Instead of declaring that the possession is in the vendee, it would be better to say that the possession is in the vendor in trust for the vendee, and that the rule that there must be a change of possession does not extend to property which is not susceptible of delivery as a growing crop.² In a case in Maine, it was held that a purchase of growing crops, though paid for, would pass no title against the creditors of the vendee until possession or delivery was had, and that unless such possession and delivery was had prior to the death of the vendor, and to the issuing of a commission of insolvency upon his estate, the title would be in the administrator in trust for creditors.³ The purchaser of a growing crop, whether at private or at execution sale, has of course a right to enter upon the premises to gather the crop.⁴ The purchaser of a growing crop is not only entitled to a reasonable time after the crop matures in which to gather it, but to a reasonable time after notice given to him by the vendor. So that an instruction that unless a purchaser of a crop of corn gathered it within a reasonable time after maturity, the owner of the field could turn in his cattle without responding to his vendee for the damage suffered by the destruction of the crop, was held erroneous.⁵

Property not in being could not be the subject of a valid mortgage at common law, and a mortgage of an unplanted crop has, therefore, generally been held void at law.⁶ But in equity, the rule was that the lien attached as soon as the subject of the mortgage came into existence, and was enforced against

¹ *Foster v. Fletcher*, 7 T. B. Mon., 534; s. c., 18 Am. Dec., 208.

² See *Robbins v. Oldham*, 1 Duv., 28; *Cummings v. Griggs*, 2 Duv., 87; *Morton v. Ragan*, 5 Bush, 334; *Bellows v. Wells*, 36 Vt., 602.

³ *Stone v. Peacock*, 35 Me., 385.

⁴ *Davidson v. Waldron*, 31 Ill., 120; *Stewart v. Doughty*, 9 Johns, 108, 112; *Whipple v. Foot*, 2 Johns., 423.

⁵ *Ogden v. Lucas*, 48 Ill., 492.

⁶ *Tomlinson v. Greenfield*, 31 Ark., 558; *Cressey v. Cressey*, 17 Hun., 120; *Milliman v. Neher*, 20 Barb., 37; *Otis v. Sill*, 8 Barb., 102; *McCaffrey v. Woodin*, 65 N. Y., 459; *Vinson v. Hallowell*, 10 Bush., 538; *Hutchinson v. Ford*, 9 Bush, 318; *Ross v. Wilson*, 7 Bush, 29; *Stowell v. Bair*, 5 Bradw., 104; *Comstock v. Scales*, 7 Wis., 159; *Redd v. Burrus*, 58 Ga., 574; *Bank of Lanesingburgh v. Crary*, 1 Barb., 542, 551; *Gettings v. Nelson*, 86 Ill., 593; *Butt v. Ellett*, 19 Wall., 544; *Cayce v. Stovall*, 50 Miss., 396. And see *Cudworth v. Scott*, 41 N. H., 456.

parties thus entering into possession have such antedating title, is not left to the judgment of the marshal. He is not clothed with

the mortgagor and those holding under him with notice.¹ In a case in Illinois it was said :

"There is some conflict in the authorities, but we think the reason and common sense of the thing is, the crop of wheat, corn, and oats, the seed for which even might not have been in existence when the mortgage was made, and was not put into the ground until the spring of 1878, had no potential existence on the third day of January, 1877, at which time the mortgagor had no idea, in all probability, as to the particular parts of land he would put into this or that crop, or how much of it, if any, he would cultivate for any particular crop. Such crops, *fructus industriales*, are entirely distinguishable from those of fields already in grass for hay, fruit orchards, etc., planted and in bearing condition, the products of which are *fructus naturales*; for, as to the former, it depends upon the will, determination, labor, and industry of the farmer, when or how they exist at all, and when produced, as in this case, they are after-acquired property, while the latter class have their roots—the living agencies—already in the soil, and, being perennial, they are dependent only on the succession of the seasons for their growth and maturity. Therefore, the law regards them as having a potential existence, even before they commence to grow in the form of the product. But the crops in this case, the seeds for which were not put into the ground until fifteen months after the mortgage, can no more properly be regarded as having a potential existence in the soil at the time of the mortgage than does the unbuilt ship in the timbers of the forest, or boots and shoes in the skins of the living herd."² There are, however, cases which declare that a mortgage of an unplanted crop made by one in possession of the land will be held valid at law; and a distinguished writer even lays it down that such a mortgage "is generally regarded as valid at law."³ But we think the statement that it is *generally* so regarded can hardly be sustained. We think the weight of authority is against its validity at law. But whether the mortgage is to be considered as valid at law or not, it is certain that if the mortgagee takes possession under the mortgage when the crops come into existence, his rights will be recognized and maintained in the courts of law. For while the mortgage may not have conveyed any legal title to the property, yet it was a valid license to enter and seize the property as soon as it was acquired or came into existence; and after such entry title vested in the mortgagee even at law. *Licet dispositio de interesse futuro sit inutilis tamen potest fieri declaratio præcedens quæ sortiatur effectum interveniente novo actu.*

As expressed by Mr. Commissioner Dwight: "The general idea running

¹ Apperson v. Moore, 30 Ark., 56; Butt v. Ellett, 19 Wall., 544; White v. Thomas, 52 Miss., 49; Everman v. Robb, 52 Miss., 653, 662; Sellers v. Lester, 48 Miss., 513; Mitchell v. Winslow, 2 Story, 631; Ellett v. Butt, 1 Woods, 214, 218.

² Stowell v. Bair, 5 Bradw., 107, 108, per McAllister, J.

³ Jones on Chattel Mort., sec. 143; Arques v. Wasson, 51 Cal., 620; Robinson v. Ezzell, 72 N. C., 231; Thrash v. Bennett, 57 Ala., 161; Van Hoozer v. Cory, 34 Barb., 9, 12; Conderman v. Smith, 41 Barb., 404; Emerson v. Eastport, etc., R. Co., 67 Me., 387, 392; Farrar v. Smith, 64 Me., 74, 77.

any judicial power to pass upon the rights of parties found upon the premises other than the defendant. The most that he can do,

through these cases in a court of law, appears to be that the executory agreement operates as a license, authority, or power, revocable in its nature, until the creditor is either put into possession of the goods at the time, or after they come into existence, or are vested in the debtor. As soon as that new act has intervened, the lien of the creditor becomes perfect, and in the absence of statutory regulation, prevails over the liens of subsequent executions."¹ And as between mortgagor and mortgagee, the mortgagor cannot recover from the mortgagee the property thus taken possession of. Having enjoyed the consideration, he will not be allowed to repudiate the agreement under which he obtained it, but will be estopped from maintaining an action for the property.²

It may be noted, however, in this connection, that it has been held that the lessor of land may stipulate in a lease that the crops grown on the premises shall remain the property of the lessor until the rent is paid. That such a stipulation will be upheld as between the parties and third persons.³ It is conceded in these cases that the sale of a thing not in existence is inoperative, but it is insisted that when the thing thereafter to be produced is the produce of land, the owner of the land may retain the general property of the thing produced, unless there is some fraud in the contract.

A valid mortgage may be made of a part of a growing crop if the part so mortgaged is so described as to be capable of identification. Thus it has been held by the Supreme Court of Georgia that a mortgage, made in May, of six bales of cotton growing and being grown and produced on a designated plantation cultivated by the mortgagor, such bales to average a certain designated weight, to be covered with bagging and bound with iron ties, and delivered at a certain warehouse on or before the fifteenth day of October following, was sufficiently specific in the description of property mortgaged, and that the mortgagee could prove that the mortgagor severed such cotton from the rest of the crop, and delivered it at the warehouse according to his agreement.⁴ But it has been held that a mortgage of so much cotton as will make two bales, each to be of a certain weight, is void on the ground that no definite part of the crop was mortgaged.⁵ A mortgage of growing crops, executed, acknowledged, and recorded in due form, is valid as against third parties without delivery of possession of the property mortgaged; but it is held that the lien of such mortgage ceases as against subsequent purchasers, after the crop is harvested, unless when harvested it is delivered to the mortgagee.⁶ But it has been held that a chattel mortgage upon a growing crop, as against an attaching creditor, con-

¹ McCaffrey v. Woodin, 65 N. Y., 463. And see Congreve v. Evetts, 10 Exch., 298; Carr v. Allatt, 3 Hurl. & N., 964.

² Moore v. Byrum, 10 S. C. (N. S.), 462, 463.

³ Bellows v. Wells, 36 Vt., 601; Gray v. Stevens, 28 Vt., 1; Briggs v. Oaks, 26 Vt., 138; Smith v. Atkins, 18 Vt., 461; Lewis v. Lyman, 22 Pick., 437.

⁴ Stephens v. Tucker, 55 Ga., 543.

⁵ Williamson v. Steele, 3 Lea, 527. And see Thurman v. Jenkins, 2 Baxt., 426.

⁶ Quiriauque v. Dennis, 24 Cal., 154; Goodyear v. Williston, 42 Cal., 11.

when such a party claims to have a title anterior to the suit, is to require from the plaintiff a bond of indemnity, or give a reason-

times to be a lien on the crop, in possession of the mortgagor, after severance and removal from the land.¹

A landlord has no such interest in crops grown on rented lands as can be made the subject of a valid mortgage.² And a mortgage of crops by one who is cultivating the farm upon shares covers only his share.³ A crop being a chattel interest, the mortgage of it should, of course, be recorded as a chattel mortgage.⁴

In England, the legal mortgagee of real property is entitled to enter immediately after the execution of the mortgage, by virtue of the estate thereby vested in him.⁵ And so long as he abstains from taking possession, the mortgagor is not bound to account to him for the rents and profits, and the mortgagee is not entitled to the growing crops which have been removed by the mortgagor between the date of the mortgage and the recovery of possession, unless he can claim them as emblements under an express contract of tenancy.⁶ But he has a right to all crops growing on the premises when he takes possession.⁷ In this country, on the other hand, the rule is that the legal estate is in the mortgagor until foreclosure of the mortgage, upon default being made, and the growing crops pass with the soil to the purchaser under the foreclosure deed.⁸

It is to be noted, however, that in Ohio a different rule was laid down from that which has been elsewhere recognized. While it was conceded that on a sale of realty the crops would pass to the grantee, in the absence of a reservation thereof, yet that the doctrine did not apply to judicial sales when conducted under their system of appraisements. "Between a mortgagor and mortgagee, a mortgagor in possession is a tenant at will," said the court, "and if the emblements are not protected in his hands, it is because he may obtain their value in account on bill to redeem. But he may lawfully lease, subject to the mortgage; and when the mortgage defeats the estate, either by entry or judicial sale, the annual crops are saved for the tenant, under the common rule relating to emblements, because the term of the lease is uncertain."⁹ This, of course, cannot be regarded as law outside the State of Ohio. Not only does the purchaser take the crop, but it has even been held that, as between the mortgagee of land who purchases at the foreclosure sale, and the execution creditors of the

¹ *Rider v. Edgar*, 54 Cal., 127.

² *Broughton v. Powell*, 52 Ala., 123.

³ *McGee v. Fitzer*, 37 Texas, 27.

⁴ 1 Jones on Mort., sec. 151.

⁵ 1 Fish. L. of Mort., sec. 715.

⁶ 2 Fish. L. of Mort., sec. 1491.

⁷ *Ibid.*; *Ex parte Temple*. 1 G. & J., 216.

⁸ *Jones v. Thomas*, 8 Blackf., 428; *Scriven v. Moote*, 36 Mich., 64; *Ruggles v. First National Bank*, 43 Mich., 192; *Gossom v. Donaldson*, 18 B. Mon., 230; *Bank of United States v. Voorhees*, 1 McLean, 221; *Gray v. Brignardello*, 1 Wall., 634; *Lane v. King*, 8 Wend., 584; *Aldrich v. Reynolds*, 1 Barb. Ch., 613; *Ledyard v. Phillips*, 13 Rep., 595.

⁹ *Cassily v. Rhodes*, 12 Ohio, 88.

able time for the party to apply to the court for a modification of the writ, so as to exclude him from the operation of the same.

mortgagor in possession, the former is entitled to the growing crops.¹ As the rule is that the crops pass with the soil, it has been said that on proper application the court may provide for their preservation until possession is given to the purchaser.² The confirmation of a foreclosure sale, covering growing crops, relates back to the time of sale, and entitles the purchaser to control the crops from that time, if no equities prevent, and after due notice has been given to interested parties.³

It has been held by the Supreme Court of California that where a debtor gives to his creditor the possession of a growing crop, under an agreement that such creditor shall harvest it and apply the proceeds to the payment of the debt, the creditor thereby obtains a lien on the crop superior to the lien acquired by another creditor to whom the debtor gave a mortgage on the crop after the first creditor had taken possession, and with notice of the rights of the first creditor.⁴

Laborers on a farm have no lien on the crop produced for their wages. The Supreme Court of Tennessee was, not long since, called on to pass on this question, and the law was declared as we have stated it. "If we should decide," said the court, "that the farm laborer has a lien on the crop, or is entitled out of the proceeds of the crop to be paid for his services, to the exclusion of all other demands until he is paid, it would be *jus dare*, not *jus dicere*."⁵

In Louisiana, however, the law has secured to the laborers a lien on the crops, and it has a preference over the lien secured to the landlord.⁶

It is held, in a recent case in Florida, that a vendor of land has not, by virtue of his lien for the unpaid purchase-money, any lien on the crops grown on the land. This doctrine is announced in a recent case in Florida, where the question was whether a vendor had such an equitable lien upon the crops, by virtue of his right to charge the land for his purchase-money, as would give him a preference over a subsequent *bona fide* mortgage creditor with or without notice of the lien on the land.⁷ So, mere ownership of the land confers no right to possess and dispose of the crop raised thereon by tenants. The landlord's right to rent must be asserted and perfected in accordance with and under the provisions of law.⁸ At the common law, as is well known, the landlord had a right to charge the goods of the tenant remaining on the premises for his rent. But this right of distress, at the ancient common law, did not extend to growing crops.⁹ But by the statute 11 Geo. II., c. 19, landlords were empowered to distrain growing crops on the estate demised, and to cut and gather them when ripe. And in Massachusetts the courts have held, that while goods

¹ Crews v. Pendleton, 1 Leigh, 297; s. c., 19 Am. Dec., 750.

² Ruggles v. First National Bank, 43 Mich., 192.

³ Ibid.

⁴ Lovensohn v. Ward, 45 Cal., 8.

⁵ Hunt v. Wing, 57 Tenn. (10 Heisk.), 139, 149.

⁶ Duglantier v. Wilkins, 19 La. An., 112.

⁷ Wooten v. Bellinger, 17 Fla., 239.

⁸ Robinson v. Kruse, 29 Ark., 575.

⁹ 1 Roll. Abr., 666; Co. Lit., 47 b.

Upon such application the court may stay the enforcement of the writ, or except the applicant from its operation until the right of

that could not be returned in the same plight in which they were taken could not be distrained,¹ yet that corn or other animal product of the soil, if ripe and fit for harvest, could be cut down and attached.² While, independent of statutes, the landlord has no lien on the crops,³ yet such a lien has been secured to him by statutory provision in many of the States. He has such lien in Alabama, Arkansas, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Mississippi, Missouri, Texas, and possibly elsewhere.⁴ A material distinction, and one of great importance, exists between the right to levy a distress on the crop, and the statutory lien thereon. The right to distrain was limited, and could only be exercised on the goods or property of the tenant so long as such property continued to be on the demised premises. The right was lost if not exercised before the expiration of the term. On the other hand, the statutory lien of the landlord is not impaired by an expiration of the term or the removal of the crops. It continues until the crop passes into the possession of a purchaser without notice.⁵ If the crops pass to one with notice, and he sells them, an action on the case can be maintained against him.⁶ The crops being on the place owned by the landlord is notice to all the world of the relation between him and his tenant, and of his lien.⁷ His lien is paramount⁸ and has priority over a mortgage of the crops,⁹ and can be enforced by attachment.¹⁰ But the lien of the landlord confers on him no title to the crops which would authorize him to bring an action of trover for them against one who should convert them to his own use.¹¹ And when there are separate contracts of renting, the landlord's lien extends to the crop grown on each of the parcels of land, but only for the rent of such parcel.¹²

When provision is made in a lease of a farm that the crops shall be holden

¹ *Bond v. Ward*, 7 Mass., 123.

² *Penhallow v. Dwight*, 7 Mass., 34; *Heard v. Fairbanks*, 5 Metc., 111.

³ *Loomis v. Lincoln*, 24 Vt., 153; *Doty v. Heth*, 52 Miss., 530, 536; *Arbuckle v. Nems*, 50 Miss., 556.

⁴ Alabama Code (1876), p. 785, sects. 3474, 3477; *Sevier v. Shaw*, 25 Ark., 609; Georgia Code (1873), p. 344, sec. 1977; Illinois Rev. Stats., vol. i., p. 661, sec. 31; Indiana Rev. Stats. (1881), sec. 5224; Kansas Gen. Stats. (1868), p. 542, sec. 24; Kentucky Gen. Stats. (1873), pp. 604, 608, sects. 1, 13; Maryland Rev. Code (1878), p. 706, sec. 14; Mississippi Rev. Code (1880), sec. 1301; Missouri Rev. Stats. (1879), vol. i., p. 516, sec. 3083; Texas Rev. Stats. (1879), p. 450, art. 3107.

⁵ *Lomax v. Le Grand*, 60 Ala., 537; *Governor v. Davis*, 20 Ala., 366.

⁶ *Hussey v. Peebles*, 53 Ala., 432. See, too, *Neifert v. Ames*, 26 Kan., 515.

⁷ *Lomax v. Le Grand*, *supra*.

⁸ *Atkins v. Womeldorf*, 53 Iowa, 150.

⁹ *Sevier v. Shaw*, 25 Ark., 609.

¹⁰ *Rotzler v. Rotzler*, 46 Iowa, 189; *Crawford v. Coil*, 69 Mo., 588; *Hubbard v. Moss*, 65 Mo., 647.

¹¹ *Folmar v. Copeland*, 57 Ala., 588.

¹² *Nelson v. Webb*, 54 Ala., 436.

the parties can be properly determined. But when sufficient bond of indemnity is tendered, and no different order is made in

for the rent and be at the disposal of the lessor, in the same manner as if he were in the actual occupation of the farm, as against subsequent purchasers and creditors of the lessee, they remain the property of the lessee until the lessor takes actual possession of the same.¹ If the lease is of such a character, however, that the lessor and lessee are tenants in common, then it would not be necessary that there should have been a delivery of the crop to the lessor.² But where the statute gives to the landlord a lien on crops grown on the premises in any year for the accruing rent, it is held to be not necessary that the landlord should obtain an attachment against the property, and that the courts will enjoin the removal or disposition of the crop while the lien continues.³

It being settled that a crop, whether growing or standing in the field ready to be harvested, is no part of the realty, but personal estate, it follows that such crops are liable to be seized on execution, and to be sold as other personal estate.⁴ And such was the common-law rule.⁵ But in *Adams v. Turner*,⁶ the Supreme Court of Alabama, in 1843, evidently doubted whether an immature crop could be taken on execution at common law, but without determining the point. It was then held, however, that if the right existed at common law, it did not exist in Alabama, where the statute provided it should not be lawful to levy an execution on crops until the crop was gathered. "The idea that the lien attached," said the court, "upon the planted crop as soon as the execution was delivered to the sheriff, though the right to levy it was postponed until a severance took place, is attempted to be deduced from the last words of the section cited, viz., 'until the crop is gathered.' These words cannot, upon any just principles of construction, be regarded so potent as to give to an execution a retrospective effect. They do not refer to the lien; if they did they would postpone it until the crop was gathered; but it is the levy they relate to and postpone until that event takes place." The lien and the right to levy were said to be so intimately connected, that if the latter was taken away or suspended, it amounted to a destruction of the former. This ruling was affirmed in 1852,⁷ but at a later period the common-law rule prevailed.⁸ It may be remarked, too, that growing crops may be sold as personalty on execution, although the land is mortgaged.⁹ It has been held in a case recently decided in

¹ *Butterfield v. Baker*, 5 Pick., 522; *Munsell v. Carew*, 2 Cush., 50.

² *Beaumont v. Crane*, 14 Mass., 400.

³ *Price v. Roetzell*, 56 Mo., 500.

⁴ *Smith v. Tritt*, 1 Dev. & B., 241; *Shannon v. Jones*, 12 Ired., 206; *Coombs v. Jordan*, 3 Bland, 312; *McKenzie v. Lampley*, 31 Ala., 526; *Hartwell v. Bissell*, 17 Johns., 128; *Shepard v. Philbrick*, 2 Denio, 175; *Stewart v. Doughty*, 9 Johns., 108; *Parham v. Thompson*, 2 J. J. Marsh, 159; *Whipple v. Foot*, 2 Johns., 422; *Patapsco v. Magee*, 86 N. C., 350.

⁵ *Poole's Case*, 1 Salk., 368; *Scorell v. Boxall*, 1 Y. & J., 398.

⁶ 5 Ala., 744.

⁷ *Evans v. Lamar*, 21 Ala., 333.

⁸ *McKenzie v. Lampley*, 31 Ala., 526.

⁹ *Preston v. Ryan*, 45 Mich., 174.

the manner indicated, the duty of the marshal will only be discharged by placing the plaintiff in possession, as directed, and

Illinois that, while as between the parties to a judgment, the seizure and sale of growing crops, on execution issued on the judgment, constitutes a severance from the realty, yet as respects the grantee in a deed of trust given by the execution debtor before the execution became a lien, such seizure and sale will not work a severance. The purchaser at the sheriff's sale will take subject to the rights of the grantee in the trust deed.¹ Under the laws of Kentucky, a growing crop is not subject to execution.²

The question has been raised whether an action of replevin may be maintained for the carrying away of crops. In *De Mott v. Hagerman*,³ decided in the Supreme Court of New York in 1828, it was held that where one enters and ousts the owner of land, continues in possession, and cuts and removes the crops, though they were sown by the owner, yet replevin will not lie for crops removed. "If the entry was lawful, the property of the wheat and rye was in the defendants. If it was unlawful and worked a disseisin, trespass *quare claustrum fregit* might have been maintained for the first entry, and after a recovery in ejectment, damages would follow for the mesne profits. But I do not see how the parties can maintain an action for the wheat and rye raised, disconnected from the remedy by trespass. If that be allowable, a plaintiff may sue in trover for wheat or corn raised on land of which he has been disseized, and that, too, before his re-entry. The action of replevin does not lie in such a case." But, as is pointed out by the Supreme Court of Indiana, in *Rowell v. Klein*,⁴ decided in 1873, that decision was rendered when much importance was attached to the form rather than to the substance of the action, and was based on a misconception of form. "The ruling in the above case," said the court, "is technical and presents a degree of nicety not recognized by many very high authorities.⁵ We believe it was always the rule that, when trespass would lie for the severing from the realty of that which by the severance became personally, replevin would lie for the recovery of such personalty, and that trespass could be maintained in any and all cases where the plaintiff had the right of property, and also the right of immediate possession, although the actual possession was in another."

In Missouri, the court has ruled that replevin will not lie for a certain number of bushels of corn, the crop standing ungathered in the field.⁶ But in a case subsequently decided in the same court, it was held that corn in the stalk was the subject of replevin, and that without regard to whether it was growing or not.⁷ We think there can be no doubt but that replevin may be maintained

¹ *Anderson v. Strauss*, 98 Ill., 485.

² *Blincoe v. Lee*, 12 Bush, 358; *Brewer v. Crosby*, 8 Bush, 388; *Morton v. Ragan*, 5 Bush, 334.

³ 8 Cow., 220.

⁴ 44 Ind., 296.

⁵ *Waterman v. Matteson*, 4 R. I., 539; 1 Chitty Pl., 149, and note 1; *Nelson v. Burt*, 15 Mass., 204; *The People v. Alberty*, 11 Wend., 161; *Schermerhorn v. Buell*, 4 Denio, 422; *Haythorn v. Rushforth*, 4 Harrison, 160; *Ely v. Ehle*, 3 N. Y., 506.

⁶ *Jones v. Dodge*, 61 Mo., 368.

⁷ *Garth v. Caldwell*, 72 Mo., 622.

this implies a removal of all occupants."* The officer cannot file counter-affidavit of party in possession to *excuse the execution of the writ.*†

for crops wrongfully severed and carried away.¹ And it is equally clear and well established that replevin will not lie at common law, by one out of possession of the realty against one in possession, under claim of title, for chattels which have become such by severance from the realty.² So, it has been held that trover would not lie for stone and gravel, the defendant being in possession and claiming adversely,³ and that an action would not lie for money had and received under the circumstances.⁴ The reason assigned was that the right to the land was the foundation of the action, and that it was not in the power of a party to change a local into a transitory action.

When the occupant of land, whether possessed of an estate in fee simple or of an estate determining with his own life, has planted a crop and died before it has been harvested, the rule at common law was, that as between the executor and the heirs at law, the crop went to the executor as compensation for the expense incurred in getting the land ready for the crop—the tilling, manuring, and sowing the land.⁵ But the rule was different as between the executor and the devisee of the land. As between them the crop goes to the devisee.⁶ The rule does not hold, however, if a contrary intention has been manifested by the testator.⁷ In this connection it may be interesting to read the language of Mr. Justice Walton, of the Supreme Court of Maine, in a recent case in that court.⁸ After noticing the fact that the common-law rule has been changed in some of

* Hall v. Dexter, 3 Sawyer, 434.

† Powell v. Lawson, 49 Ga., 290.

¹ See Wells on Replevin, sec. 74; Jarratt v. McDaniel, 32 Ark., 604.

² Renwick v. Boyd (Supreme Court of Pennsylvania, February 20th, 1882), 13 Reporter, 571. And see Brown v. Caldwell, 10 Serg. & R., 114.

³ Mather v. Trinity Church, 3 Serg. & R., 509.

⁴ Baker v. Howell, 6 Serg. & R., 476.

⁵ Fisher v. Forbes, 9 Vin. Abr., 373, tit. Emblements, pl. 82; Latham v. Atwood, Cro. Car., 515; Gwin v. Hicks, 1 Bay, 503; Laurin v. McCall, 3 Strober, 21; Evans v. Inglehart, 6 Gill & J., 173; Singleton v. Singleton, 5 Dana, 92; Thornton v. Burch, 20 Ga., 791; Penhallow v. Dwight, 7 Mass., 34; Wadsworth v. Allcott, 6 N. Y., 64.

⁶ Cro. Eliz., 61; Co. Lit., sec. 68, note 2; 4 Bac. Abr. (Bouvier's ed.), 83; Bull. N. P., 34; Spencer's Case, 1 Winch, 51; West v. Moore, 8 East, 339; Cox v. Godslave, 6 East, 604, note; Dennett v. Hopkinson, 63 Me., 353; Hathorn v. Eaton, 70 Me., 219; Budd v. Hiler, 29 N. J. L., 43; Shofner v. Shofner, 5 Sneed (Tenn.), 94; Fetrow v. Fetrow, 50 Pa. St., 253; Pratt v. Coffman, 27 Mo., 424; Carnagy v. Woodcock, 2 Munf., 234; Grubb's Appeal, 4 Yeates, 23; Creel v. Kirkham, 47 Ill., 344; Smith v. Barham, 2 Dev. Eq., 420; s. e., 25 Am. Dec., 721.

⁷ Spencer's Case, 1 Winch, 51; Cox v. Godslave, 6 East, 604, note; Fetrow v. Fetrow, 50 Pa. St., 253; Pratt v. Coffman, 27 Mo., 424; Shofner v. Shofner, 5 Sneed (Tenn.), 94.

⁸ Dennett v. Hopkinson, 63 Me., 350, 355.

Co-tenant.—If two persons be in joint possession, and it not appearing that either claimed under the other, and one only is sued

the States by statute, he says: "We are inclined to think the law is best as it is; that, although the rule which gives to the devisee of the land the unharvested crops, and denies them to the heir at law, may seem to be unphilosophical, it is nevertheless founded in practical wisdom. Not unfrequently the heirs at law are mere children, without discretion of their own to enable them to care for the growing crops, and without legal guardians to aid them. They are sometimes scattered and far away. The death of the ancestor may be sudden, and the condition of his family such that the crops, unharvested as well as harvested, may be needed for their immediate support. Will it not be better, therefore, in the great majority of cases, that all the crops, the unharvested as well as the harvested, should be regarded as personal property, and go to the administrator? We cannot resist the conviction that it is better that it should be so. Not so, however, of a devisee of the land. He is the selected object of a specific donation. If, for any cause, it is probable that he will not be in a condition to take charge of it at the donor's death, the contingency can be provided for in the will. It is a matter which the testator would be likely to think of and provide for if necessary. If there is no such provision, and the gift is unconditional, without words of limitation or restraint, we think it may fairly be presumed that it was the intention of the donor that his donee should take the land as a grantee would take it,—with the right to immediate possession and the full enjoyment of all that is growing upon it, as well the unsevered annual crops, as the more permanent growth." It has been laid down that if A., seised in fee, sows the land and devises to B. for life, remainder to C. in fee, and dies before severance, (1) that the executor of A. shall not have the emblements; (2) and that if B. dies before severance, his executor shall not have them, but they shall go to him in remainder; (3) but if the devise had been only to B., and B. had died, then the executor of B. should have had the emblements, though B. did not sow.¹

By the common law the widow is entitled to the crops growing, at the death of her husband, upon that part of the homestead farm which is assigned to her by the heir for her dower.² And the reason assigned is that the wife is in *de optima possessione viri*,—i. e., that she derives title and possession directly from her husband, and therefore above the title of the executor or heir. But the widow remaining in possession of the mansion and plantation of her husband until her dower is assigned to her, is held not to be entitled to the crops growing on the plantation at the time of the death of her husband.³ So, where dower has not been assigned, and the widow continues in possession of the mansion house and plantation under statutory provisions, the rule is the same, and she is not entitled to the crops.⁴ And where a dowress in possession of

¹ Co. Lit., 55 b.

² 2 Inst., 81; Dyer, 316; Park on Dower, 355; Parker v. Parker, 17 Pick., 236; Catlin v. Ware, 9 Mass., 218.

³ Budd v. Hiler, 3 Dutch., 43.

⁴ Budd v. Hiler, *supra*; Whaley v. Whaley, 51 Mo., 36; Kain v. Fisher, 6 N. Y., 598.

by a stranger, the judgment will bind only the defendant, and the writ of possession should not affect the other.* Where the

land on which she had sown a crop of wheat, consented, in a suit for partition, that her dower in the premises might be sold, and the property was sold, and she received her share of the proceeds of the sale, it was held that the growing crop passed by the sale, and that she could not claim the same as emblements, her estate having terminated by her own act in consenting to the sale.¹

As to tenants at will, it is laid down as follows in Littleton's Institutes: "If the lessee soweth the land, and the lessor, after it is sown and before the corn is ripe, put him out, yet the lessee shall have the corn, and shall have free entry, egress and regress to cut and carry away the corn, because he knew not at what time the lessor would enter upon him."² The comment of Sir Edward Coke is: "The reason of this is, for that the estate of the lessee is uncertain, and therefore, lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he sets rootes, or sow hempe or flax, or any other annual profit, if, after the same be planted, the lessor oust the lessee; or if the lessee dieth, yet he or his executors shall have that yeare's crop. But if he plant young fruit trees or young oaks, ashes, elmes, etc., or sow the ground with acornes, etc., then the lessor may put him out notwithstanding, because they will yeeld no present annual profit." From the earliest times to the present, then, the law has been that where an estate is of an uncertain termination, and is suddenly concluded by the act of God, or that of the lessor, the lessee or his legal representatives may claim the emblements.³ But the rule is otherwise where the tenant's interest is to terminate at a fixed time, or if he by his own act has brought his lease to an end.⁴ In such cases he is not allowed to claim the emblements, inasmuch as it is by his own folly that he has sowed that which he could not reap. So, where a woman held an estate in lands during her widowhood, and sowed the land, and before severance married, it was held that the crop belonged to the

* *Stokes v. Morrow*, 54 Ga., 597.

¹ *Talbot v. Hill*, 68 Ill., 106.

² Lib. i., ch. 8, sec. 68.

³ *Noy's Maxims*, 51; 1 *Cruise's Dig.*, tit. 9, *Estate at Will*, ch. 1, sec. 12; *Graves v. Weld*, 5 Barn. & Ad., 105; *Weem's Exr. v. Bryan*, 21 Ala., 302, 308; *Rising v. Stannard*, 17 Mass., 287; *Debow v. Titus*, 10 N. J. L., 151, 153; *Davis v. Thompson*, 13 Me., 209, 215; *Comfort v. Duncan*, 1 Miles, 229; *Kittredge v. Woods*, 3 N. H., 503, 505; *Davis v. Brocklebank*, 9 N. H., 73; *Sherburne v. Jones*, 20 Me., 70; *Stewart v. Doughty*, 9 Johns., 108, 112; *Bennett v. Bennett*, 34 Ala., 53; *Brown v. Thurston*, 56 Me., 126; *Reilly v. Ringland*, 39 Iowa, 106; *Burrowes v. Caines*, 2 Upper Canada, Q. B., 228.

⁴ See the cases cited in the note above. Also *Caldecott v. Smythies*, 7 Car. & P., 808; *Whitmarsh v. Cutting*, 10 Johns., 360; *Harris v. Carson*, 7 Leigh, 632; *Hawkins v. Skegg*, 10 Humph., 31; *Talbot v. Hill*, 68 Ill., 106; *Chandler v. Thurston*, 10 Pick., 210; *Clark v. Rannie*, 6 Lans., 210; *Reeder v. Sayre*, 70 N. Y., 180, 185; *Harris v. Frink*, 49 N. Y., 24; *Bain v. Clark*, 10 Johns., 424; *Dircks v. Brant*, 56 Md., 500.

judgment is for an undivided interest in the land, the judgment and writ of possession is only authority for putting the plaintiff

landlord of whom she held, and not to her or to her husband.¹ So, too, where the tenant for life forfeits his estate by committing waste.² And where a minister of a church, entitled to the possession of the parsonage land, while in possession thereof sowed the land with grain, then sold the growing crop, and voluntarily ceased to be the minister of that church, and removed from the parsonage land before the crop was harvested, it was held that his vendee did not obtain such title as would entitle him to maintain trover for the crop.³ The sale could not vest in the purchaser any greater right than would have remained in the seller.

If the tenant at will was ousted before the crop was put in, the rule at common law was that he could not recover for the expense of ploughing and manuring the land, but that if the ouster took place after the crop was put in that he was entitled to the emblements.⁴

An interesting question relating to the right of a tenant to emblements, the tenancy being for an indefinite period, was considered a few years ago by the Supreme Court of Tennessee. In that case the plaintiff or tenant had sowed on the land in November, 1872, a crop of English winter oats, and had harvested the same in the following June. He then ploughed in the stubble so as to get another crop, which was the custom. And this crop was growing in November, 1873, when he was compelled to leave the place. The defendant cut and harvested the oats, and the plaintiff sued in replevin, claiming that he was a tenant at will, and his term having been terminated by his landlord, that he was entitled to the growing crop as emblements. The question was, therefore, whether the crop was of that character secured to tenants in such cases. The court held it was not. "When the tenancy is of uncertain duration and is terminated by the landlord after the crop is sown, but before it is severed from the freehold, the tenant or his representative shall be entitled to one crop of that species only, which ordinarily repays the labor by which it is produced within the year within which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. . . . If this second crop of oats had grown without labor by the plaintiff, he would not have been entitled to it after the expiration of his term, as he had already harvested the crop sown by him, and the additional labor bestowed upon it does not change the result. . . . Ploughing in the stubble, we think, is not equivalent to sowing another crop, though it produce the same result."⁵

While, as we have seen, the rule is that a tenant cannot reap who plants a crop which he knows cannot mature until after the termination of his tenancy, yet a custom that tenants, whether by parol or deed, shall have the waygoing crop after the expiration of their terms, is good. It was so determined in the

¹ Oland's Case, 5 Co., 116.

² Cro. Eliz., 461; Co. Lit., 55, a; 2 Bla. Comm., 123, 145.

³ Debow v. Colfax, 10 N. J. L., 151.

⁴ Bro. Abr., tit. Emblements, pl. 7 tit. *Tenant per copie de court roll*, pl. 3. And see Stewart v. Doughty, 9 Johns., 108, 112.

⁵ Hendrickson v. Cardwell, 9 Baxt., 389.

in possession with the defendant, and should not put the defendant out of the possession.*

Court of King's Bench as early as 1779, in *Wigglesworth v. Dallison*.¹ The opinion of the court was by Lord Mansfield, and was as follows: "We have thought of this case, and we are all of opinion that the custom is good. It is just, for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown, when they know their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly. The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease, it only superadds a right which is consequential to the taking, as a heriot may be due by custom, although not mentioned in the grant or lease." And such is the law in this country.² In the same way it is held, that a custom that a tenant may leave his waygoing crop in the barns of the farm for a certain time after the expiration of the lease and his quitting the estate, is good.³ The waygoing crop to which the tenant is entitled under the above decisions is the grain sown in the autumn before the expiration of the lease, and which comes to maturity in the summer after the determination of the lease. But if he puts in the spring crop, as oats, before he leaves, he is not entitled to gather it, but loses it, unless protected by an express contract.⁴ In a case decided in West Virginia in which the court conceded the doctrine that where the lease was for a fixed period, and was silent as to who was entitled to the waygoing crop, the off-going tenant would not be entitled to the crop, it was held that where the lease recognized the right of the tenant to sow in the last year of the term, he would have the right to reap the waygoing crop, the lease being silent as to who should be entitled thereto.⁵

The rule is that one recovering in ejectment is entitled not only to the soil, but to the crops growing on it and constituting part of it.⁶ After judgment is

* *Wilson v. Hall*, 13 Ire. (N. C.) Law, 489; *Levis v. Hicks*, 38 Cal., 234; *Withrow v. Biggerstaff*, 82 N. C., 82; *Dupont v. Ervin*, 2 Brev. (S. C.), 79; *Ash v. McGill*, 6 Whort. Penn., 391.

¹ Douglas, 201. And see *Boraston v. Green*, 16 East, 71; *Holding v. Pigott*, 7 Bing., 465.

² *Van Doren v. Everitt*, 5 N. J. L., 460; *Templeman v. Biddle*, 1 Harr. (Del.), 522; *Stultz v. Dickey*, 5 Binn., 285; *Shaw v. Bowman*, 91 Pa. St., 414; *Diffendorfer v. Jones*, cited 5 Binn., 289; *Biggs v. Brown*, 2 Serg. & R. 14; *Comfort v. Duncan*, 1 Miles, 231; *Derwie v. Bossler*, 1 Pa. St., 224; *Foster v. Robinson*, 5 Ohio St., 90; *Iddings v. Nagle*, 2 Watts & S., 22; *Lewis v. McNatt*, 65 N. C., 63; *Dorsey v. Eagle*, 7 Gill & J., 331. And see *Reeder v. Sayre*, 70 N. Y., 180, 185; *Brown v. Parsons*, 22 Mich., 28.

³ *Lewis v. Harris*, cor. Skynner, C. B. Hereford Sum. Assizes, 1778; *Beavan v. Delahay*, 1 H. Bl., 5; 3 Bac. Abr., 23 (Bouvier's ed.).

⁴ *Taylor's L. & T.*, 420, note 3 (6th ed.). ⁵ *Kelley v. Todd*, 1 W. Va., 197.

⁶ *Rowell v. Klein*, 44 Ind., 290, 295; *McClean v. Bovell*, 24 Wis., 295. See *Doe v. Witherwick*, 3 Bing., 11.

So, if the land recovered is subject to an easement, it shall be delivered to plaintiff subject to such easement.*

obtained in ejectment, the defendant is to be considered as a trespasser from the date of the demise laid in the declaration. If he has not harvested the crops he has no right to do so; and if they have been harvested, the landlord, in an action for mesne profits can recover their value.¹ So, if a tenant sows a crop during the pending of ejectment against his landlord, and with notice of the pendency of the suit, he has no right to enter after having surrendered the possession, and cannot remove the crops so sown.² And if the defendant in ejectment, after execution of a writ of possession, enters, cuts, and removes a crop, the plaintiff in ejectment may recover its value from him in trover.³ But where one sows, cultivates, and harvests a crop upon the land of another, he is held to be entitled to the crops as against the owner of the land, whether he came to the possession of the land lawfully or not, provided he remained in possession until the crop was harvested.⁴ While the owner may recover for use and occupation, he can in no case be held to be the owner of crops grown and actually harvested on the land by the defendant while in possession.⁵ And where one purchases land of another, which had been planted and cultivated by a stranger without the grantor's consent, and the stranger continued in possession and harvested the crop, the grantee cannot sue for the value of the crop. For, while the stranger would be liable for the use of the property, the value of the crop would not be the measure of damages.⁶ A person who settles on public land and plants thereon a crop, cannot maintain trespass *quare clausum fregit* against one who thereafter purchases the land from the government, and enters for the purpose of gathering and converting such crop to his own use. As against such vendee the trespasser has no remedy. The crop passes with the land to the vendee.⁷ As between vendor and vendee, growing crops are real estate, and unless removed, pass to the purchaser by a deed of the land as being a part of the freehold.⁸ And the rule is that the reservation of the crops cannot vest in parol, but must be in writing.⁹

In an early case the Supreme Court of Pennsylvania held that growing grain did not pass to the vendee of the land, on the ground that it was personal

* *Reformed Church v. Schoolcraft*, 65 N. Y., 134; *Sedwick & Wait*, § 130-132, 571.

¹ *Hodgson v. Gascoine*, 5 Barn. & Ald., 88.

² *Rowell v. Klein*, *supra*.

³ *Altes v. Hinckler*, 56 Ill., 256.

⁴ *Adams v. Leip*, 71 Mo., 597.

⁵ *Page v. Fowler*, 39 Cal., 412.

⁶ *Jenkins v. McCoy*, 50 Mo., 348.

⁷ *Floyd v. Ricks*, 14 Ark., 236.

⁸ *Talbot v. Hill*, 68 Ill., 106; *Powell v. Rich*, 41 Ill., 466; *Smith v. Price*, 39 Ill., 28; *Bull v. Griswold*, 19 Ill., 631; *Gibbons v. Dillinghamton*, 5 Eng., 9; *Floyd v. Ricks*, 14 Ark., 286, 291; *Forte v. Calvin*, 3 Johns., 222; *Crews v. Pendleton*, 1 Leigh, 305; *Hancock v. Caskey*, 8 S. C., 282; *Porche v. Bodin*, 28 La. An., 761; *Jones v. Thomas*, 8 Blackf., 428; *Pitts v. Hendrix*, 6 Ga., 452.

⁹ *Powell v. Rich*, 41 Ill., 466; *Smith v. Price*, 39 Ill., 28; *Dixon v. Nichols*, 39 Ill., 372; *Austin v. Sawyer*, 9 Cowen, 39; *Wintermute v. Light*, 46 Barb., 283; *McIlvaine v. Harris*, 20 Mo., 457; *Brown v. Thurston*, 56 Me., 126.

Restitution.—Should the sheriff deliver possession of lands not authorized by the writ, or evict parties not legally subject to the

property.¹ But in 1838 the same court overruled that case, and placed itself in line with adjudications elsewhere.² And while it is now held in that State that growing crops will pass to the vendee of the realty, yet it is held that a parol reservation of the crops may be shown. "To confine a party," said Chief Justice Black, "to the terms of a written agreement, from which an important part of the actual bargain is omitted at the request of the other party, and on his solemn assurance that it shall be performed, though not inserted, is such a fraud as the jurisprudence of no civilized country will tolerate. The evidence was admissible beyond a doubt. The vendor was entitled to relief in equity, though not perhaps under the head of mistake."³

In Ohio, the courts have held that the reservation of the crop may be shown by parol evidence, as between vendor and vendee. "However little favor should be shown," said Mr. Justice Worden, "to reservations made by the vendor by parol, when he is in possession, there must be some such reservations which are valid. It is, in such instances, a question of intent. When that intent relates to things which may sometimes be treated as realty and sometimes as personalty, the evidence of its manifestation in the conduct of the parties, or in their words at the date of the deed, does not seem to alter, enlarge, or limit their written contract. For, as already observed, that contract does not necessarily embrace such things."⁴ But that court holds that a parol reservation of trees, which were the spontaneous growth of the land, would be inadmissible, inasmuch as they were not raised by labor for the purposes of trade, and could not be levied on as personalty even with the consent of the owner of the land.⁵

A question has been raised as to whether any distinction is to be made between ripe and unripe crops standing unharvested at the time of conveyance. Such a distinction seems to have been taken in Illinois, where the court declared as follows: "It has been uniformly held that by a conveyance of land, without a reservation in a deed, the crops and all things depending upon the soil for sustenance belong to and pass with the land. After the crops have matured, however, it is otherwise; but until they are matured they constitute such an interest in real estate as to bring them within the statute of frauds. And to pass by a sale by the owner of the soil, it must be evidenced by a written agreement; or, if reserved from the operation of a conveyance, it must be in writing."⁶ If the court meant, in the language above quoted, to express an opinion that ripe, but unharvested, crops would not pass by a conveyance of the realty, the opinion can only be regarded as an *obiter dictum*, for it was by no means essential to the decision of the case. The question, however, was

¹ Smith v. Johnson, 1 Penrose, 471.

² Wilkins v. Vashbinder, 7 Watts, 378.

³ Lauchner v. Rex, 20 Pa. St., 464.

⁴ Baker v. Jordan, 3 Ohio St., 438 (1854). Followed in Youmans v. Thomas, 4 Ohio St., 76, 79.

⁵ Jones v. Timmons, 21 Ohio St., 605.

⁶ Powell v. Rich, 41 Ill., 466.

writ, or where the judgment has been reversed on appeal, or vacated for irregularity, or a party has been turned out by mis-

fairly raised in a case recently decided in the Supreme Court of Iowa, and the conclusion reached was, that matured crops, ready for the harvest, but not actually severed from the soil, did not pass by a sheriff's deed, executed upon a foreclosure sale.¹ As the subject is one of importance, and the authorities in point are few, it is well to notice the reasons upon which the conclusions of the court were supported. The court said: "The grain being mature, the course of vegetation has ceased, and the soil is no longer necessary for its existence. The connection between the grain and the ground has changed. The grain no longer demands nurture from the soil. The ground now performs no other office than affording a resting-place for the grain. It has the same relations to the grain that the warehouse has to the threshed grain, or the field has to the stacks of grain thereon. It will not be denied that when the grain is cut it ceases to be a part of the realty. The act of cutting it, it is true, appears to sever the straw from the land. But it is demanded by the condition of the grain. It is no longer growing. It is no longer living blades, which require the nourishment of the soil for its existence and development. It is changed in its nature from growing blades of barley or oats to grain mature and ready for the reaper. Now, the mature grain is not regarded by the law like the growing blades, as a part of the realty, but as grain in a condition of separation from the soil. . . . There is no valid reason why the act of cutting should change the property in the grain. . . . We think the ownership of the grain should be determined by its condition, not by the act of cutting, which cannot be done as soon as it is demanded by its condition." In arriving at its conclusion, the court evidently overlooked the fact that the same question had been previously raised in the Supreme Court of Michigan, in a case in which a directly opposite conclusion was reached.² The question there raised was whether a crop of corn standing on the premises in December, the date of the deed, passed with the land. And the court held that the question could no more depend upon the maturity or immaturity of the crop, than the passage of a standing forest tree, by a conveyance of the land, would depend upon whether the tree was living or dead. Stress was laid on the fact that the question of severance could be ascertained with certainty, while the fact of the maturity of the crop would be determined in many cases with great difficulty. "It is true," said the court, "that the authorities in alluding to this subject generally use the words 'growing crops,' as those embraced by a conveyance of the land; but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops." Thus the question stands at the present time, and future adjudications must determine, as between these conflicting cases, which of them laid down the rule which ought to govern in such controversies. It is to be remarked, however, that so far as the statute of frauds is concerned, it has been laid down that a sale of standing crops, *fructus industriales*, is not a

¹ Hecht v. Dittman, 20 Am. L. Reg. (N. S.), 615.

² Tripp v. Hascilg, 20 Mich., 254.

take, the party aggrieved can move for a writ or order of restitution; to support which the applicant must make out a clear case free from ambiguity.*

sale of an interest in land, within the meaning of the 4th section of that statute, without respect to the maturity or immaturity of the crop.¹ It is difficult to see why the same principle should not be applicable in both cases.

When there is a parol contract for the sale of lands, and under such contract the vendee, with the consent of the vendor, enters into possession of the land and puts in crops, the question arises whether the invalidity of the contract to sell and convey affects the title of the vendee to the crops, provided the vendor refuses to perform, repudiates the contract, and ejects the vendee from the land. Such a question arose in the Supreme Court of New York,² in a case where the vendor had ejected the vendee and harvested the crop. That court was of opinion that the vendee could not maintain an action against the vendor for taking the crop, and a nonsuit was accordingly granted on the ground that the crop was part of the realty, and that the vendee having no legal title to the land, could have none to the crop. But the Court of Appeals reversed the judgment, declaring that "the invalidity of the parol agreement to sell and convey the land, did not affect the plaintiff's title to the crop. If the agreement had remained executory in all its parts, of course, none of its stipulations could have been separately enforced, though if standing alone they might have been valid. But although, by reason of the entirety of the contract, the plaintiff could not have enforced the stipulation allowing him to possess and work the farm, so long as it remained executory, yet after it had been so far executed that the crop had been sown and was growing, the invalidity of the other provisions of the contract, under the statute of frauds, could not be invoked by the party who refused to complete, as against the party not in default, for the purpose of invalidating that part of the contract which had been executed, and divesting the plaintiff's title to the crop raised in pursuance of it."³

In a case recently decided in Missouri, it is held that the courts will take judicial notice that certain crops mature at certain seasons—in that case, that corn was mature in December.⁴ And so in Arkansas judicial notice was taken that a crop of corn could not have matured by the 10th of August. But contra in Illinois: 39 Ill., 373.

* *Blair v. Pathkiller*, 5 Yer. Tem., 230; *Jackson v. Styles*, 5 Cow., N. Y., 418; 29 Penn. St., 347; 46 Cal., 270; 3 Bibb (Ky.), 314; *California & Min. Co. v. Redington*, 50 Cal., 160; *Ib.*, 289.

¹ *Jones v. Flint*, 10 Ad. & E., 753; *Buck v. Pickwell*, 27 Vt., 157, 163; *Carson v. Browder*, 2 Lea, 701.

² *Harris v. Frink*, 2 Lans., 35.

³ *Harris v. Frink*, 49 N. Y., 29.

⁴ *Garth v. Caldwell*, 72 Mo., 622.

CHAPTER II.

THE TRIAL—PRACTICE—EVIDENCE, ETC.

THE *trial* is "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause for the purpose of determining such issue."* The plaintiff in an action to try the right to the possession of the land, takes upon himself, in the first instance, the burden to show at least a *prima facie* case, before the defendant is required to show any testimony whatever. The defendant having placed himself right in court, so far as the pleadings are concerned, can sit down and *wait* for the plaintiff to show a cause of action and such a state of facts, which, if not contradicted, will entitle the plaintiff to a verdict and judgment.

When the plaintiff has done this, he has made what is called a "*prima facie* case." "What is *prima facie* evidence of a fact?" "It is such as, in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose."† And it follows that the plaintiff may then "close his

* 2 Bou. Law Dic., 602.

† Justice Story, in *Kelly v. Jackson*, 6 Peters' U. S. R., 632. The claimant¹ or plaintiff in ejectment must be a person who has the legal right to enter and take possession of the land, etc., in respect of which action is brought, as incident to some estate or interest therein.²

Nature of Ejectment.—Ejectment is the action by means of which a person who is kept out of possession of land (or of corporeal hereditaments)³ which he has a right to enter upon, or can have the wrongful possessor ejected.

¹ Claimant is the technical term for a plaintiff in ejectment. In explaining this and the following rules the general term plaintiff is usually employed.

² See Cole, Ejectment, 65, 72. He adds the words, "not barred or extinguished by the statute of limitations." As where a right is barred or extinguished it cannot be strictly said to exist, these words are unnecessary for the purpose, at any rate, of the present rule.

³ Cole, Ejectment, 72. Ejectment lies only for the recovery of certain kinds of property, viz., lands, tenements, or incorporeal hereditaments, the general rule being that "ejectment will lie to recover the possession of anything whereof the sheriff can deliver possession" (Selwyn, N. P., 13th ed., 627), and in strictness will (subject to some few exceptions) not lie for the recovery of any property whereon an entry cannot be made (*Ibid.*, 614, 615). It will, for example, lie to recover lands, houses, a part of a house, a coal mine, a salt pit, an orchard,

case in chief," no further evidence being necessary until the defendant shall have rebutted the same, or in some way made it necessary to offer evidence in *reply* to that offered and received on the part of the defendant. Mr. Cole, in his treatise on Ejectment (which gives a full outline of the English practice under the Procedure Act of 1852) says, "The claimant must produce, in the first instance, all the evidence upon which he relies in support of his case; he cannot be permitted to prove a mere *prima facie* title, and when that is controverted by evidence by the defendant produce further evidence in reply to strengthen and confirm his *prima facie* title. Where, however, the evidence in reply is to *disprove* the defendant's title or ground of defence, it seems that in the discretion of the court the plaintiff may be allowed to offer evidence, notwithstanding its tendency to support the original case."* He then illustrates his view: If the defendant attempts to show a deed void for fraud under the statute of Elizabeth, the plaintiff may *reply* that he paid a valuable consideration, etc.; if the plaintiff claims as heir, and the defendant produces a will, the plaintiff may show in reply that the will was revoked. Mr. Cole says, it is not sufficient to show a *prima facie* "title." The usual expression in this country is *prima facie* "case," and there is, perhaps, a difference between a *prima facie* "title" and *prima facie* "case." The plaintiff would not be allowed to show simply (in all cases) a *deed in fee* to himself, and then close, and in *reply* trace the title back to the State or government: *this* might possibly be a *prima facie* "title," but not a *prima facie* "case;" for if he stop at this point the defendant need offer no evidence, the plaintiff not having made a *prima facie* "case;" that is to say, not such a case as will entitle him to recover in ejectment, under the rules and principles of law applicable thereto.

a vestry, and so forth; but will not lie for a canonry, which is an ecclesiastical office only, or for things, such as an advowson, a common in gross, which are not capable of being delivered in execution. Thus, while it has been held to lie for land covered with water, it has been held not to lie for a stream. (For these and other examples, see 1 Selwyn, N. P., 13th ed., 627, 628.) Though decided cases mostly refer to the mode in which property should be described in the writ, they sufficiently establish the principle, that ejectment can only be brought for that kind of property, *e. g.*, houses, etc., of which the sheriff can give possession.

* Cole on Ejectment, 300 (notes), citing 1 Tay. Ev., 336 (2d ed.).

The *rules* of evidence and the *discretion* of the court regulate this part of the procedure.

But before the plaintiff offers his title-papers it must appear that the proper *party defendants* are before the court. Under the old practice, even with the "consent rule," the plaintiff was required to show the defendant in possession at the time of the service of the declaration.

The party sued is usually called the "tenant in possession," and this term applies as well to the *owner* of the fee who is in possession as to any other person who may be found in possession.*

The object of the old action was to obtain, not damages, but the possession of the land. He, therefore, brings his action against the party in possession.

It is, therefore, with the exceptions made in the practice and by statute, an indispensable part of the plaintiff's case to show the defendant in possession of some part of the disputed land at the time of bringing suit.† If the plaintiff fails in proving the defendant in possession at the time of bringing the suit he will be nonsuited.

The object of this rule was to prevent *surprise*. If no one applied to defend the action, the plaintiff could not take judgment against the casual ejector, unless it was proved that the person on whom a copy of the declaration was served was in possession. But there were some exceptions to this rule, in cases where the party who was served with the declaration after leaving the possession, but who came in and entered into the consent rule and contests the matter upon the title, there being no question as to the identity of the land. So, where one makes a distinct admission before suit is brought that he is in possession.‡ Or where one, upon his own motion, procures himself to be made a party defendant in an action brought against another;§ or where the

* Dicey on Parties, 519; Cole, Ejectment, 75.

† Brown v. Brackett, 45 Cal., 167; Flanniken v. Lee, 1 Ire. N. C., 293; Ward v. Parks, 72 N. C., 452; Atwell v. McClure, 4 Jones' N. C. Law, 371; Maryland Digest, 257; Doe v. Roe, 30 Ga., 553; 7 Blackf. (Ind.), 12; Albertson v. Redding, 2 Murp. N. C., 283; Mahoney v. Middleton, 41 Cal., 41.

‡ Medcai v. Oliver, 2 Hawks N. C., 479.

§ Gorham v. Brennan, 2 Dev. R., 174; Carson v. Burnett & Mills, 1 Dev. & Bat., 560.

ejectionment is against the tenant, a person is admitted on his affidavit to defend, in which he claims title to the land, the possession of the tenant is thereby admitted to all the lands covered by the declaration.* As to the reasons for these exceptions, see the learned opinion of C. J. Pearson, in *Atwell v. McLure*.† The law and practice ought to be such that in *the trial of the title* to land, neither the litigants nor the juries should be called to consider the secondary and collateral issue of possession.‡ Indeed, this question is most usually settled now by the admissions in the *answer*. The complaint describes the land and alleges possession, and the answer must respond to material allegations.

Many of the courts hold the general issue an admission of possession.

The landlord and tenant may now be joined; husband and wife in certain cases; the mortgagee with the party in possession, and parties occupying by a joint possession should all be made defendants.§

If the defendants claim under distinct titles they may be allowed to defend separately on separate titles.|| The *plaintiff* may recover in a single action several distinct tracts of land under different titles if he has been unlawfully ejected from them by the same defendant.¶

When the landlord is admitted as a party defendant the tenant does not thereby cease to be a party; if the landlord die the plaintiff may proceed against the tenant alone.**

The Party Claiming Title may be Sued.—The law of several of the States has changed the rule of the common law, and under these statutes, if the defendant has an *adverse claim* on claimant's land he is liable to be sued, though not actually in possession.††

* *McDowell v. Love*, 8 Ired. Law, 502.

† *Atwell v. McLure*, 4 Jones' Law (N. C.), 371.

‡ *Sedwick & Wait*, § 236. Under the present holding in Tennessee the plea of not guilty admits the defendant in possession of the land sued for, unless he states upon record the extent of his possession. Therefore the plaintiff need not prove the same on the trial. *James v. Brooks*, 6 Heisk., 157.

§ *Harkey v. Houston*, 65 N. C., 137; 36 N. Y., 513; 68 N. Y., 450.

|| *Helfenstein v. Leonard*, 50 Penna. Stat., 461.

¶ *Sedwick & Wait*, § 128; *Jackson v. Woods*, 5 Johns, N. Y., 278.

** 9 *Humph. Tenn.*, 137.

†† *Smith v. Lee*, 1 Cald. Tenn., 549, citing *Kelley v. Hare*, 1 *Humph.*, 163 (where the common law is shown). See *Tenn. Act 1852 (Code, § 3231)*.

The Act of 1851-2 provided: "The person actually occupying the premises shall be named defendant in the declaration. If they be not occupied, the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein at the commencement of the suit."

This section underwent a judicial construction in the case of *Langford v. Love*.^{*} In this case the defendant was not in possession, but held an *entry* (equitable claim) which covered a portion of the land in dispute, and the question was, whether this action of ejectment could be brought. The court held that it could *not*; but that the expressions "*claiming title*," "*or some interest therein*," meant a *legal title*. The court says: "This general language would certainly, if literally understood, embrace an equitable 'title' or 'interest,' as well as legal. But such, we think, could not have been the intention of the legislature. If it should be held that a person setting up a claim under a mere equitable title, though not in possession of the disputed premises, was subject to be sued in ejectment, it would necessarily follow that he must be let in to all his equitable defences. This would be to convert the action of ejectment into a suit in equity. Such a radical change, so inconsistent with the present organization of our judicial system, cannot be supposed to have been contemplated by the legislature. The action of ejectment is strictly a *legal* remedy. It looks only to the legal title. It cannot be maintained except the plaintiff has the legal estate in the premises. The defendant must resort to a court of equity to avail himself of his equitable title. The words 'title' or 'interest,' used in the act must, therefore, be understood as meaning *legal title*, or *legal interest*."

If, however, the defendant had claimed under a *deed* or *grant*, the suit would have been properly brought.

So the code of North Carolina provides, that "in an action to recover the possession of real estate, the landlord and tenant thereof may be joined as defendants, and any person *claiming title* or *right of possession* to real estate, may be made parties plaintiff,

^{*} *Langford v. Love*, 3 Sneed, 309 (in 1855). For the reasons of the decision in this case, see *Campbell v. Campbell*, 3 Head, 325; *Crutzyenger v. Catron*, 10 Humph., 24; *Lafferty v. Whitesides*, 1 Swan, 123.

or defendant, as the case may require, to any such action.”* This provision of the code in regard to bringing suit against the party *out of possession*, but simply “claims title,” has not been construed by the courts, but no doubt under this code a party *out of possession* may be sued. The practice in several of the States now authorizes suit instituted against the party *exercising acts of ownership*, or “claiming title.”†

Squatters—Servants or Employés.—In the Circuit Court for the District of Oregon it was held that several defendants, who were squatters and trespassers, without color of title or definite claims to distinct parcels, could be sued in a single action, for the reason that the plaintiff is not expected to know how they claim and to what extent.‡ The Supreme Court of the United States says:§

“In the action of ejectment a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him, they are all trespassers, and he cannot know how they claim, whether jointly or severally; or, if severally, how much each one claims. Nor is it necessary to make such proof in order to sustain his action. Each defendant has a right to make defence specially for such portion of land as he claims, and by so doing he necessarily disclaims any title to the residue of the land, and if on the trial he succeeds in establishing his title, he is entitled to a verdict.” He may demand a separate trial, and thereby avoid the issues, complications, and costs of the others.

As a general rule, a mere *servant* or *employé*, claiming no interest or right to the possession, is not such an occupant as is liable to a suit in ejectment, within the meaning of the rules of

* N. C. Code, § 61.

† Sedwick & Wait, § 234; *Hanson v. Armstrong*, 22 Ill., 442; *Langford v. Love*, *supra*; *Hill v. Kriebel*, 11 Wis., 442; 12 Vt., 231; *Quicksilver Mining Co. v. Hicks*, 4 Sawyer, 688; 40 Barb. N. Y., 89; 36 N. Y., 513; *Harvey v. Tyler*, 2 Wall., 328.

‡ *Gibbons v. Martin*, 4 Sawyer, C. Court R., 206.

§ *Greer v. Meyers*, 24 How., 277.

this action.* In New York, however, it has been held that an ejectment in which the premises were not actually occupied, but work was being done thereon by a servant of a person making claim thereto, that the servant was the person exercising *acts of ownership* over the land, and was the proper party defendant.† So the preacher who performed services under the direction of a religious corporation is not liable to be sued in ejectment. In England a parson who was claiming the right to enter and perform services was held not to have sufficient title to be admitted to defend in ejectment.‡

Ejectment Against the United States.—It has been quite a debatable question as to who should be made a party defendant, when the United States is in possession of the property by its officers, employes, tenants, or agents. In England ejectment will not lie for lands in possession of the crown, through its officers; the citizen has to resort to petition of right.§ Numerous cases have held that the government cannot be brought into the courts without its consent.||

In the recent case of *Carr v. United States* it was held that a judgment in ejectment did not constitute an estoppel against the government.¶ In this case Mr. Justice Bradley said: "We consider it to be a fundamental principle that the government cannot be sued except by its own consent; and certainly no State can

* *Hawkins v. Reichert*, 28 Cal., 534; 44 Cal., 36; *Chiniquy v. Catholic Bishop*, 41 Ill., 148; *Lucas v. Johnson*, 8 Barb. N. Y., 244.

† *Shaver v. McGraw*, 12 Wend. N. Y., 558.

‡ *Martin v. Davis*, Strau., 914; 1 Salk., 256.

§ *Adams*, Ejectment (4th Am. ed.), 18; 3 Black, 255; *Broom's Constitutional Law*, 241.

|| See *Federalist*, No. 81; *Cohens v. Virginia*, 6 Wheat., 204; 8 Peters, 436; 6 Wall., 484; 9 How., 386; 11 How., 272; 84 N. Y., 272; *The Davis*, 10 Wall., 15. See *The Fidelity*, 16 Blatch. Circuit Court Reports, 569; *Siren*, 7 Wall., 154.

English Practice.—In the English practice, under 15 and 16 Vic., and anterior thereto, if a mere servant, bailiff, or other person having no title, be served with a writ in ejectment wherein he is named as a defendant, he should not appear, otherwise he may render himself personally liable as a trespasser, and his capacity of servant will afford no defence. He should hand the writ to his employer, leaving him to apply to the court for leave to defend as tenant in possession "by himself." *Doe and James v. Stanton*, 2 Barnewell & Alderson, 371; *Cole*, Ejectment, 124.

¶ *Carr v. United States*, 98 U. S., 433.

pass a law, which would have any validity, for making the government suable in its courts. It is conceded in *The Siren** and in *The Davis* that without an act of Congress, no direct proceedings can be instituted against the government or its property." In the still later case of *Campbell v. James*,† the same doctrine was adopted in the argument, although this question was not directly involved.

This was an action by a patentee against a postmaster of the United States for the infringement of a patent covering a stamp for printing postmarks and cancelling stamps. The suit went off without a decision upon the main question, the court expressing a doubt as to whether such an action could be maintained, and expressly refers to *Carr v. United States*.‡

But in the recent work of "Trial to the Title to Land," by Sedwick & Wait, they have given an interesting review of the authorities, and show that a different doctrine has been held in the same court from that announced in *Carr v. United States*.§

These authors say: "Notwithstanding the remarks of the Supreme Court of the United States in the case of *Carr v. United States* and *Campbell v. James*, already quoted, the right of an individual claimant of lands, which are in the possession of officers, employes, or agents of the government, to assert his title and recover the possession in the courts, has been upheld by the court in a number of cases which are not even referred to in *Carr v. United States*, or *Campbell v. James*, and which it is difficult to believe that the court intended to overrule.|| *Meigs v. McClung's Lessee*, one of the most prominent of these cases, was an action of ejectment, the plaintiff claiming the land under a grant from the State of North Carolina, and the United States

* 7 Wall., 152.

† 10 Wall., 15.

‡ 21 Patent Office Gazette, 337.

§ Sedwick & Wait, §§ 244-248. The following cases are said to be in conflict with the doctrine stated in the several cases heretofore cited, including *Carr v. United States*, namely: *Meigs v. McClung's Lessee*, 9 Cranch; *Wilcox v. Jackson*, 13 Peters; *Brown v. Auger*, 21 How., 305; *Grisor v. McDowell*, 6 Wall., 363; 12 Wall, 391; The Arlington case of *Lee v. Kaufman*, 3 Hughes, 36. Since the publication of Sedwick & Wait the Arlington case has been affirmed by the Supreme Court of the United States, which is a case directly in point and opposed to *Carr v. United States* and others.

|| Sedw. & Wait, § 246.

asserting title to it under an Indian treaty. The defendants were officers of the government, and were maintaining a garrison upon the land under its authority." The objection was made that the government could not be sued. Ch. J. Marshall said, in delivering the opinion: "The fact that the agents of the United States took possession of this land, erected expensive buildings thereon, and placed a garrison there, cannot be permitted to give an explanation to the treaty which would contradict its plain words and obvious meaning. The land is certainly the property of the plaintiff below, and the United States cannot have intended to deprive him of it by violence, and without compensation." Mr. Justice Field, in a later case,* said: "The premises for the possession of which this action is brought, are situated within the city of San Francisco. The plaintiff claims to be seized in fee of them, and derives his title . . . etc. The defendant is an officer of the United States army, commanding the military department of California, and as such officer entered into the possession of the premises before the commencement of this action, and has ever since held them, under the order of the Secretary of War, as a part of the public property of the United States." In the cases of *Meigs v. McClung*,† *Wilcox v. Jackson*,‡ *Brown v. Huger*,§ *Cooley v. O'Connor*,|| the defendants were officers of the United States in possession of the land by the alleged authority of the government, and the question here presented arose in some form in each of those cases.

This right is recognized by some of the State decisions. In California, the case of *Polack v. Mansfield*,¶ the court said: "The rule which exempts the mere servant or employé of another from an action, presupposes that the *employer* may be sued, and that the wrongs of which the plaintiff complains may be redressed by an action against the employer, as being the real party in committing the ouster. In a case, therefore, where the employer is

* *Grisar v. McDowell*, 6 Wall., 363.

† *Meigs v. McClung*, 9 Cranch.

‡ *Wilcox v. Jackson*, 13 Peters, 498.

§ *Brown v. Huger*, 21 How., 305.

|| *Cooley v. O'Connor*, 12 Wall., 393; see *Grisar v. McDowell*, *supra*.

¶ *Polack v. Mansfield*, 44 Cal., 36. *In accord*: *McConnell v. Wilcox*, 1 Scam., Ill., 344; *Swasey v. North Carolina R. R. Co.*, 1 Hughes, 17; 71 N. C., 571; *Osborn v. Bank United States*, 9 Wheat., 738; *Davis v. Gray*, 16 Wall., 203, Chase, C. J., *Davis, J.*, dissenting; 10 Federal Reporter, 315; *Hancock v. Walsh*, 3 Woods C. C., 351.

for any reason not amenable to the action, the rule referred to has no application, and the employer or servant becomes, *ex necessitate*, the proper party-defendant, since he is the only party who can be subjected to suit at all.

"Were this otherwise, it would result that open and admitted violation of private right would find no redress in the courts of the country. The government of the United States, as such, cannot be sued as a party-defendant in the courts of the State, and unless its servants and employés may be properly held responsible for the lawless invasion of private property, committed by them under the direction or command of the government, the citizen is left wholly without the protection which it is the first aim and purpose of the municipal law to afford."

This language of the Supreme Court of California is worthy of the highest commendation. The rule which the courts adopt in regard to the States should prevail as to the United States. This doctrine was clearly expounded by C. J. Waite, sitting as a Circuit Court, at Raleigh, N. C., in the case of *Swassey v. North Carolina R. R. Co.*, *supra*. In this case the State of North Carolina held certificates of stock in this railroad company, but the stock, under the law, had been pledged for the *security* of certain bonds of this company owned by the complainant.

It was insisted in this case that the State of North Carolina was, in fact, a party-defendant, and consequently the court could not entertain jurisdiction. In the course of an interesting opinion, Chief Justice Waite said: "Since the case of *Osborn v. The Bank of the United States*,* it has been the uniform practice of the courts of the United States to take jurisdiction of causes affecting the property of a State in the hands of its agents without making the State a party, when the property or the agent is within the jurisdiction. In such cases the courts act through the instrumentality of the property or the agent."

But the recent case of the Arlington† property, as it seems, has settled the question beyond further controversy in favor of the right in the private individual to sue the agents or officers of the

* *Osborn v. The Bank of the United States*, 9 Wheat., 738.

† *Lea v. Kaufman*, 3 Hughes, Circuit Court R., 36. See *Morrison's Transcript*, p. 269. (To appear in 106 U. S. Rep., not published.)

government (holding property under the authority of the same), in an action of ejectment.

In regard to the Arlington property, the plaintiff Lee claimed the property. The government of the United States claimed title to the same under a tax sale, being one of a series of such sales which had been declared void by the courts. This valuable and notable estate was occupied at the time of bringing the suit, by officers, agents, tenants, and others of the Federal Government, and the lands were used as a military station, and as a national cemetery established for the burial of deceased soldiers and sailors, known as the "Arlington Cemetery." The action was ejectment, in which the officers and occupants, some two hundred in number, were made defendants. The government, through the attorney-general, intervened upon the record, and moved to dismiss for the want of jurisdiction; this motion was denied, and the plaintiff Lee recovered the property, in the Circuit Court. On a writ of error to the Supreme Court the decision of the Circuit Court has been, within the last few months, *affirmed* in a most thorough and exhaustive opinion by Mr. Justice Miller upon this point.* The title to the property being thus established in Lee, a committee of the Senate for the XLVIIth Congress reported a bill authorizing the government to purchase the same at the price of two hundred and fifty thousand dollars, which will, no doubt, become a law.†

Other Persons may be made Defendants, such as Corporations, Counties, Cities, Insolvents, Husband and Wife, Infants, etc.— The earlier doctrine that ejectment could not be brought against a corporation aggregate does not now prevail.‡ If the property

* See *Bennett v. Hunter*, 9 Wall., 326; *Tracy v. Irwin*, 18 Wall., 549; *Atwood v. Weems*, 99 U. S. R., 183. Mr. Justice Miller reviews all the past decisions, and explains *Carr v. United States* as not the opinion of the court, but of the judge who wrote it. This case has stripped the question of all further controversy, and the decision is founded on the very highest reasons.

† Chief Justice Waite, Mr. Justice Bradley, Woods, and Gray *dissented*. The dissenting opinion of Mr. Justice Gray is replete with historic judicial learning on this point of jurisdiction, but most of the authorities are drawn from governments of a monarchical form; the same reasons do not apply to our government.

‡ *Dater v. Troy Turnpike, etc., Co.*, 2 Hill, N. Y., 629; *Sedw. & Wait*, § 250; *People v. Mayor & N. Y.*, 28 Barb., 240.

is occupied by the tenant of the corporation he must be sued and not the corporation.

In some of the States it is held that ejectment can be maintained against a railroad corporation in the same way as against an individual.* These suits were mostly where the railroad company had taken possession of private property without taking proceedings of condemnation to subject private property to public use. In the late case of the Chicago and I. RR. Co. v. Hopkins,† where "the plaintiff purchased at judicial sale land over which a railroad company had constructed its road without right or condemnation, it was held that he could eject the company, and that he need take no notice of their possession, as they were mere intruders."

So if a county claims that certain land has been dedicated to public use, and takes possession of the same, ejectment may be brought.‡ The same as to a city.§

It has been held, however, in other cases, where the corporation uses the land for the purposes of a street only, and asserts no other claim or interest, that ejectment will not lie.||

No doubt a public easement itself may be the basis of an action of ejectment, but it seems that the rules with regard to ejectment in the case of streets in cities, constitutes an exception to the general principles governing the action.¶ But if the railroad occupy any part of the street for the actual use of its roadway the action will lie.**

A municipal corporation may bring ejectment to maintain a public easement, where the easement was such that the exclusive occupation and use of the property was necessary to the enjoyment of the easement.†† Ejectment may be maintained against

* Smith v. Chicago, A. and St. L. RR., 67 Ill., 191; Chicago, B. and Q. RR. Co. v. President, etc., 33 Ill., 195; Edwardsville RR. Co. v. Sawyer, 92 Ill., 377.

† Chicago and I. RR. Co. v. Hopkins, 90 Ill., 316; Sedw. & Wait, § 250.

‡ Barry v. Sonoma Co., 43 Cal., 217.

§ Armstrong v. St. Louis, 69 Mo., 307; Strong v. City of Brooklyn, 63 N. Y., 1.

|| Van Rensselaer v. Jewett, 2 N. Y. R., 141; 9 Watts (Penn.), 258; 52 Tex., 222; 32 N. J. Eq., 268; 15 Cal., 223; Smith v. Wiggins, 48 N. H., 105.

¶ Sedw. & Wait, § 161.

** 21 Wis., 602; 2 Wis., 153.

†† Hoboken Land and Improvement Co. v. Hoboken, 7 Vroom, N. J., 540.

an infant, the action being in tort, but he must appear and be represented by guardian.*

At common law the possession of husband and wife was that of the husband, and where the husband claims the lands in his own right it was improper to make the wife a party, except when it could be shown that the ouster dispossession or holding over was the *act* of the wife. But if the wife claims title to the land (especially under the married women acts) she is a proper party, and indispensable, if the plaintiff wishes to settle the controversy, as the rights of the feme covert cannot be affected by a proceeding in which she is not a party; the fact that the husband is a party is not sufficient.†

Who may be Admitted to Defend.—If the plaintiff omits to sue parties who claim an interest, such persons may become parties on application; and sometimes the court, under the statutes, will exercise a discretion and have the parties brought in, “when a complete determination of the controversy cannot be had without.”‡

It may be said briefly that any person may be made a defendant “who has or claims an interest in the controversy adverse to the plaintiff.”§ Parties claiming in *opposition* to defendant’s title cannot be admitted to defend.|| Neither if the person thus seeking to become a party claims a title paramount to both parties.¶

An infant may become a party as a landlord through his guardian.** And when vested with the title to land he can become a party defendant to any suit in which the title or possession is

* *Marshall v. Wing*, 50 Me., 62; 3 Hill, N. Y., 147; *Beckley v. Newcomb*, 24 N. H., 360; 5 Gray (Mass.), 399.

† *Stewart v. Patrick*, 68 N. Y., 450; *Hodson v. Van Fossen*, 26 Mich., 68; *Lewis v. Brewster*, 57 Penn. St., 410; *Cahoon v. Coe*, 57 N. H., 556.

‡ *Colgrove v. Koonce*, 76 N. C., 363.

§ *McCown v. Hannah*, 3 Oregon, 302; *Rollins v. Rollins*, 76 N. C., 264; *Lytle v. Burgin*, 82 N. C., 301.

|| *Jackson v. Flint*, 2 Cow., N. Y., 594; *Colgrove v. Koonce*, 76 N. C., 363.

¶ 51 Cal., 559; *Files v. Watts*, 28 Ark., 151.

** *Stiles v. Jackson*, 1 Wend., N. Y., 316.

A third party claiming as landlord will be allowed to defend, although the plaintiff claims to be the landlord. *Rollins v. Bishop*, 76 N. C., 268. See *Wise v. Wheeler*, 6 Ire. Law, N. C., 196; *Mitchell v. Barratta*, 17 Gratt. (Va.), 455; *Marvin v. Dennison*, 1 Blatch. C. C., 159; *Hanks v. Price*, 32 Gratt. (Va.), 108; *Falkner v. Jones*, 12 Ala., 165; 57 Ill., 371.

brought in question, and it is the duty of the court to appoint a guardian *ad litem*. When the new party defendants are thus made, the suit stands as though they had been made parties in the original summons at the instance of the plaintiff. It would be idle ceremony to admit them as parties, and then say that they could not be heard on the merits of the controversy. Therefore the plaintiff must prepare (if not already done so by anticipation) to meet the new complication and show a better *legal* title or superior equity to the defendants.

Under the rules of the strict action of ejectment no person (without the permission of the lessor) could be substituted to the place of the tenant except the landlord, but under our statutory ejectments and practice under the code system this rule is changed. Under the old rule the landlord was entitled to no defence which the tenant could not make, but that rule is now changed, and the party when admitted is not bound by any estoppel as against the party first sued.

Under these rules and decisions it has been said with much truth, in speaking of allowing all parties "claiming an interest," and the liberal extension of the meaning of the word "landlord:":* "The decisions,' in effect, practically convert *ejectment*

* *The English Practice*.—The Common Law Procedure Act, 1852, contains a series of enactments relating to appearances in ejectment:

SEC. 171. "The person *named* as defendant in such writ, or either of them, shall be allowed to appear within the time appointed."

SEC. 172. "Any other person *not named* in the writ shall, by leave of the court, be allowed to appear and defend, on filing an affidavit showing that *he is in possession of the land either by himself or tenant*."

SEC. 173. "Any person appearing to defend as landlord in respect to property, whereof he is in possession only by his tenant, shall state that he appears as *landlord*; and such person shall be at liberty to set up any defence which a landlord, appearing in an action of ejectment, has heretofore been allowed to set up, and no other."

SEC. 174. "Any person appearing to such writ shall be at liberty *to limit his defence to part only of the property mentioned in the writ, describing that part with reasonable certainty*."

SEC. 176. "The court or judge shall have power to strike out or confine appearances and defences set up by persons not in possession by themselves or tenant."

The word "*landlord*" extends to all persons claiming title *consistent with the possession of the occupier*, whether he has actually received any rent or not. 4 T. R., 122; Statute 15 and 16 Vict., ch. 171-177; Cole on Ejectment, pp. 122-133.

It will be observed that the English practice does not allow any person to

into a modern statutory action for the determination of conflicting claims to real property, at least so far as the title under which the actual possession is held is concerned."*

Who may bring Suit in Ejectment?—This may be answered in a general way without the enumeration of particular persons or class of persons. For instance, the Act of 1852, re-enacted in the code of Tennessee, provides that "any person having a valid subsisting legal interest in real property, and a right to the immediate possession thereof, may recover the same by action of ejectment." And this is substantially the law in all the States where they have a statutory ejectment; and those where the code allows "the real party in interest" to sue, the law of ejectment as long recognized in its elementary principles is about the same. There is this difference to be observed, however, among the different States: as we have seen in many instances, the fictions of the old action have been abolished and a *special* procedure provided for ejectment (and this is the result of the English statute of 15 and 16 Vict.); others have provided a code system (as North Carolina), in which no special procedure for ejectment is provided, but both legal and equitable remedies may be blended in the same action. In the latter State the plaintiff may combine the prayer to establish title with that for equitable relief, as a specific performance of a contract to convey, and at the same time the title may be determined and a writ of possession awarded.†

Indeed, the courts of Tennessee have said that it was not the intention of this statutory regulation to enlarge or amplify the means by which titles to lands may be acquired or defeated,—the legislation operates alone upon the *remedy*.‡

appear and defend not being mentioned in the writ, except *he is in possession by himself or tenant*.

The term "landlord" is very much the same meaning as with us. And under the American practice the party who makes his appearance on the ground of "having an interest," need *not* be in possession by himself or tenant.

* Sedwick & Wait, "Trial of Title to Land," § 266.

† Code of Tenn., § 3229; Act of 1851-52, ch. 151, § 2.

‡ Tennessee has changed the old action, by the substitution of the statutory procedure, while the separate equity jurisdiction is retained, and the action of ejectment is confined strictly to *legal* titles, and governed by most of the rules of the old action. In Michigan, the court hold ejectment as purely a *possessory* action, etc. *Covert v. Morrison*, 13 N. W. Reporter, 390.

§ *Copeland v. Murphey*, 2 Cold., 64; *Rogers v. Cawood*, 1 Swan., 142.

So it has already been stated that the courts of North Carolina consider the action to recover land as containing most of the elements of the fictitious action; and the rules and practice of the old action is observed in fact or by analogy, except where a positive change is made.*

What the Plaintiff must show.—C. J. Catron has said in one case,† “The well-established rule is that the plaintiff must make out a connected legal title, and show he has an estate, and the then right of possession in himself.” The plaintiff, in making out his chain of title, can begin at either end of the chain. Frequently it is not necessary to exhibit the entire chain from the grantee down to the plaintiff; as, for instance, if he shows that the land has been *granted*, it matters not to whom, and a deed to himself, with seven years (or other limitation prescribed), his title is *prima facie* complete.

In the States where the action is strictly a possessory action, a *prior possession* is sufficient to recover as against a mere *intruder* showing no title.‡

Proof that A. B. was in the actual possession of land, or in receipt of rents and profits thereof, is *prima facie* evidence that he was then seised in fee simple. But while this is so, Mr. Cole says, “It is frequently more advisable in ejectment to prove it by producing the deed or will whereby the fee is granted or devised. It is not generally advisable to rely on a mere *prima facie* case, where a good title can be proved by conclusive evidence, unless there be some special reasons for doing so.”§

Proof of possession for *twenty years* and upwards is sufficient *prima facie* evidence of seisin in fee, even in an action of ejectment.|| This is especially so in England, since the Limitation Acts of 3 and 4 Will. 4, ch. 27, confers the title after twenty years’ possession, and *extinguishes* the outstanding right of entry.¶ If the defendant be shown to be a *mere wrong-doer*, proof of prior

* Harkey v. Honston, 65 N. C., 137; Woody v. Gilliam, 64 N. C., 649.

† Kimbrough v. Benton, 3 Humph. Tenn., 129.

‡ Covert v. Morrison (Mich.), 13 N. W. Reporter, 390; 40 Mich., 561; 4 Verm., 291; 9 Cush., 475; 39 Mo., 569. So in England, 38 Eng. Law and Eq., 469; Jones v. Easley, 53 Ga., 454; 25 Wis., 613.

§ Cole, Ejectment, p. 213.

|| Doe & Harding v. Cooke, 7 Bing., 346.

¶ Cole, Ejectment, p. 212.

possession, and the wrongful act of the defendant, whereby the plaintiff was deprived of such possession, is sufficient *prima facie* evidence of title.* Thus proof that the plaintiff was in actual possession for one year under a lease, and that the defendant then entered and turned him out by force, is sufficient to throw the onus upon the defendant of proving title. So in ejectment for five houses it was proved that claimant had received the rents of some of them for four quarters, and others for five quarters, down to March, 1841, and that in that month the defendant entered and claimed as his freehold; this was allowed to go to the jury as evidence of the title of the plaintiff.†

General American authorities, besides those already cited in the note, hold the doctrine that *prior possession is sufficient* to enable the plaintiff to recover in ejectment *against a trespasser or intruder*. Thus in *Christy v. Scott*,‡ the Supreme Court of the United States say, "A mere intruder cannot enter on a person actually seised and eject him and then question his title, or set up an outstanding title in another. The maxim, that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser who entered without any title." In the absence of the proof of title on either side, a presumption of title is in favor of the first possessor.§

This presumption is a rebuttable presumption, and may be overcome by evidence.||

There are other instances where the plaintiff need not deraign

* Cole, Ejectment, p. 213.

† Cole, Ejectment, p. 213, and cases cited by the author.

‡ *Christy v. Scott*, 14 How., 282. See *Burt v. Pangland*, 99 U. S., 180; 1 Cush. (Mass.), 575; *Jackson v. Hazen*, 2 Johns. (N. Y.), 438; *Whitney v. Wright*, 15 Wend. (N. Y.), 171. (See note 8, *ante*.) Sedw. & Wait, Ch. 27, § 717-723.

§ *Yates v. Yates*, 76 N. C., 142; *Ulric v. Johnston*, 24 Penna. Stat., 72; 3 Oregon, 178; *Kelley v. Mack*, 49 Cal., 524; 2 Greenl. Ev., § 618; *Clarke v. Clarke*, 51 Ala., 498; *Lum v. Reed*, 53 Miss., 73; 33 Mo., 172; 5 Litt. (Ky.), 317; *Wilson v. Palmer*, 18 Tex., 592.

|| *Yates v. Yates*, 76 N. C., 142; *Rawley v. Brown*, 71 N. Y., 85. See *Thompson v. Burhaus*, 79 N. Y., 93.

his title down from the grantee (or first purchaser, as it is called in England sometimes).

First. *Where the defendant sued is the tenant of the plaintiff.*

Second. *Where the plaintiff is the purchaser at execution sale, and sues the debtor who was in possession at the time of levy and sale.*

Third. *Where both the plaintiff and defendant claim under a third party as a common source of title.*

Fourth. *Where, for any cause, the defendant is affected by estoppel.*

The *First* instance, however, is the case of an estoppel, it being the most familiar learning that the tenant is estopped from disputing or assailing the landlord's title, or from setting up an outstanding title during the existence of the tenancy.* The estoppel ceases upon redelivery of the possession. He can then buy up a title and assert the same.† The estoppel does not bind the tenant where he was induced to accept the tenancy by force, fraud, or misrepresentation.‡

Neither is the tenant bound by the estoppel where the title of the landlord has expired, or been extinguished, since the relation of landlord and tenant was created by sale or judgment of law.§ In North Carolina, where the tenant was entitled to homestead, the same being sold at execution sale, it was held that becoming the tenant of the purchaser at such sale did not estop him from setting up the homestead.||

"The tenant may show that he himself has acquired the title by voluntary alienation, or purchase under execution sale, for it is no more prejudicial to the landlord that the tenant should pur-

* *Wilson v. James*, 79 N. C., 349; *Davis v. Davis*, 83 N. C., 71; *Longfellow v. Longfellow*, 61 Me., 590; 12 Johns., N. Y., 182; 7 Oregon, 467; 38 Tex. 75; 57 N. H., 15; 38 Iowa, 341; 14 Peters, 156; 113 Mass., 348; 12 Ga., 386; 79 N. Y., 400; 26 Minn., 255; 61 Mo., 253; 18 Wall., U. S., 436; 92 U. S., 107; 7 T. R., 488; 6 Am. Law Rev., 1.

† 29 Ga., 503; 43 Mich., 45.

‡ 33 Mo., 172; 43 Cal., 300; 9 Ala., 317; 32 Gratt. (Va.), 27; 63 Ill., 126; 11 Vt., 323.

§ 2 Green. Ev., § 305; *Moss v. Union Bank*, 7 Bax. (Tenn.), 216; *Jackson v. Rowland*, 6 Wend. (N. Y.), 666; 8 Ala., 606; 21 Cal., 309; 2 B. Mon. (Ky.), 234; 10 Md., 333; 30 Miss., 513; 5 Conn., 291; 5 Ill., 84; 41 Mo., 447; 18 N. H., 222; 3 Ohio, 57; 51 Ala., 493; *Lancashire v. Mason*, 75 N. C., 455.

|| *Abbott v. Cromortie*, 72 N. C., 292.

chase or acquire the title, than that it should pass into the hands of a stranger.”*

It has been held that a tenant in common is not estopped to deny the co-tenancy. The relation of landlord and tenant stands on different grounds. Each tenant in common enters as owner for himself.† This is where the defendant relies upon the defence of adverse possession. But, if the co-tenant enter and hold as such tenant in common, he is estopped to deny the common title.‡

Second. Where the defendant was the defendant in the execution, and in possession at the time of levy and sale. In this case, the defendant being in possession creates a *prima facie* case that he was the owner of the legal title at the time, and the plaintiff need not show title behind this in order to make a *prima facie* case. And in the case of *Kimbrough v. Benton*,§ C. J. Catron intimated that this was as far as the courts had gone in relieving the plaintiff in ejectment from “making out a connected legal title.” But the defendant may show, in fact, that at the time of levy and sale he had no interest subject to execution and sale, and defeat the plaintiff.|| If the defendant was *not* in possession at the time of levy and sale, then the plaintiff shows title as in other cases.

Third. Where both plaintiff and defendant claim under a third party as a common source of title.

This condition of the parties is not generally that of a strict estoppel, for parties holding under deeds taking effect at different times cannot be said to be in the relation of estoppel to each other.¶ In *Wortham v. Cherry*,** Judge McKinney, of the Supreme bench of Tennessee, although a celebrated land lawyer, carried this doctrine so far that in a later case, of *Moss v. Union Bank*,†† the court greatly modified that decision.

* *Casey v. Gregory*, 13 B. Mon. (Ky.), 505; *Texas Land Co. v. Tieman*, 53 Tex., 619; *Silvey v. Summer*, 61 Mo., 253; 61 Mo., 249; 66 Me., 167; 69 N. Y., 1-15; 20 Kansas, 709; *Lamson v. Clarkson*, 113 Mass., 348.

† *Washington v. Conrad*, 2 Hump., Tenn., 562; 21 Wis., 331.

‡ *Sedw. & Wait*, § 291-292; cases cited.

§ *Kimbrough v. Benton*, 3 Hump. (Tenn.), 129.

|| *Kimbrough v. Benton*, *supra*, citing *Tillery v. Wilson*, 1 Tenn. R., 236.

¶ *Frey v. Ramseur*, 66 N. C., 466.

** *Wortham v. Cherry*, 3 Head., 469 (Tenn.).

†† *Moss v. Union Bank*, 7 Baxter, 216.

It was said, in *Wortham v. Cherry*, "that when both parties claim under the same third party it is sufficient to prove derivation of title from him, without proving his title;" to which, abstractly, there may be no objection, but, as applied to the facts of that case, it was treated as a *conclusive estoppel* on the defendant for all purposes, and the plaintiff was allowed to recover upon this estoppel.

But it is not a strict estoppel, and has only been adopted by the *practice* of some of the courts, and become a *law of the court*, that where both parties claim under the same common title, it is not necessary for the plaintiff to trace title further back than this common title. The question being, generally, who has obtained the true title?

But the defendant may, notwithstanding this rule of practice, set up an outstanding paramount title to the *common source*, with which he can *connect himself*, or, he may show a title under an incumbrance created by the common grantor prior to the title to the plaintiff.* And the defendant in ejectment may show that the party under whom the lessor claims had no title when he conveyed to the lessor, although the defendant claims from the same party, if it be by a subsequent conveyance.†

"One claiming under a deed is not estopped by it to show that his bargainor did not have title at a time anterior to the delivery of his deed."‡

So it appears that when this rule of practice has served its purpose, then the other rules of law, estoppel, evidence, etc., applicable to ejectment are in full force. It is certainly a rule of convenience, and, when properly understood and applied, serves a practical and useful purpose in the trial of ejectment suits.

Fourth. As to strict *estoppels*, when sufficient to authorize a recovery; attention is called to the chapter on "Estoppel," and the points there noticed will not here be repeated.

* *Moss v. Union Bank*, 7 Baxter, 216; *Norwood v. Morrow*, 4 Dev. & B., 442; *Newlin v. Osborne*, 2 Jones, 164; *Johnston v. Watts*, 1 Jones, N. C., 228; *Ibid.*, 547; *Baswick v. Wood*, 3 Jones, 306; *Brown v. Smith*, 8 Jones, 331; *Hassell v. Walker*, 5 Jones, 270; 3 Hump. (Tenn.), 129; *Wissenhunt v. Jones*, 78 N. C., 361; 2 Green. Ev., § 305, § 307 (note); 10 Hump., 50.

† *Moss v. Union Bank*, *supra*; *Frey v. Ramseur*, 66 N. C., 466.

‡ *Frey v. Ramseur*, 66 N. C., 466.

So it will be observed that these propositions just discussed constitute a kind of exception to the general rule in ejectment that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's title. With these modifications of the rule, it is a fundamental doctrine of ejectment that "*the plaintiff must recover upon the strength of his own title, and not upon the weakness or defect of the defendant's title.*"*

As a result of this rule the defendant, when not a *mere intruder*, may show an *outstanding title in a third party*, although he does not claim under it, and thereby defeat the plaintiff. For if the court can see that *another* has the *title* and right of possession it will not turn out one man and put another in, neither of whom has title; but the defendant being in possession, the court will not disturb the same until the real owner brings suit.

This outstanding title must be a valid subsisting title, not barred by the statute of limitations, or for other cause inferior to plaintiff's title.† A grant or deed obtained by the defendant since the institution of the suit, may be read in evidence in bar of the plaintiff's claim.‡

If the plaintiff after bringing the suit execute a deed to a third party for the land in litigation, the defendant cannot set that up as an outstanding title, for it is consistent with and subject to the claimant's title.

Tenants in Common.—Ouster is a question of fact for the jury, and the burden of proving the same rests upon the party alleging it.§ This proof is only called for when the defendant sets up the defence of being a co-tenant. The objection that a tenant in common must show an ouster can only be taken by a co-tenant, or by one claiming under him.||

What Constitutes an Ouster?—This question is sometimes difficult to determine and the decisions are not harmonious.

* Adams, Ejectments, 28, 232; Cole on Ejectments, 287; 5 Term. R., 107; De & Oliver v. Powell, 1 A. & E., 531.

† "The plaintiff must remove every possibility of title in another person before he can recover, no presumption being admitted against the person in possession." Richards v. Richards, 15 East, 294 (note a).

‡ Dickenson's Lessee v. Collins, 1 Swan (Tenn.), 516.

§ 1 Overton (Tenn.), 265.

|| Taylor v. Hill, 10 Leigh (Va.), 457; Van Bibber v. Frazier, 17 Md., 436.

|| Sedwick & Wait, § 282.

Perhaps the best and most satisfactory evidence of an *ouster* is a specific demand of the plaintiff to be let into possession of the premises and a positive refusal to comply with the demand. In a case of this kind, there being no other evidence, the jury might be directed to find an ouster from the demand and refusal.*

Some of the courts have held, "there must be outward acts of exclusive ownership, of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information, and give notice to the co-tenant that an adverse possession and actual disseisin, are intended to be asserted against him."†

Several cases are found indicating what acts will *not* amount to an ouster.‡

The taking of the whole profits, says Coke, "is no ejectment."

It requires something more than the mere taking of profits and payment of taxes. There must be a hostile possession.

Proof of denial of plaintiff's title, accompanied with exclusive claim of possession and receipt of the whole rents, is sufficient to establish an ouster.§

It is a familiar rule that ejectment cannot be maintained by one co-tenant against another, except in case of *actual ouster*.||

Tenants in Common against Third Persons.—At common law when a demise was joint the recovery must be joint.¶ And

* 28 Cal., 494; *Miller v. Myers*, 46 Cal., 535; 56 Cal., 209.

† *Warfield v. Lindell*, 38 Mo., 561-581; *Zeller v. Eckert*, 4 How. U. S., 289; *Bogges v. Meredith*, 16 W. Va., 1; 17 W. V., 908; *Culver v. Rhodes*, 87 N. Y.; *McClung v. Ross*, 5 Wheat., 124; 6 Metc. (Mass.), 360; *Hart v. Gregg*, 10 Watts (Penn.), 185.

‡ 25 Me., 434; 4 N. Y., 61; 47 Conn., 474; 20 Ark., 547; 10 Watts (Penn.), 158; 9 Gray (Mass.), 276; 30 Penn. Stat., 507.

§ *Sedwick & Wait, Trial of Title, etc.*, § 234.

|| *Barnitz v. Casey*, 7 Cranch, 456; *Halford v. Letherow*, 2 Jones, N. C. Law, 393; *Story v. Sanders*, 8 Hump. (Tenn.), 663; *Trapnall*, 7 Hill, 31 Ark., 345; *Siglor v. Van Riper*, 10 Wend. (N. Y.), 414; *Gilchrist v. Ramsey*, 27 U. C. Q. B., 500; *Taylor v. Hill*, 10 Leigh (Va.), 457; *Jones v. Perkins*, 1 Stew. (Ala.), 512; *Day v. Howard*, 73 N. C., 1; *Bethell v. McCool*, 46 Ind., 303.

English Practice.—As to the present English practice where a co-tenant is the plaintiff, under the statute 15 and 16 Vic., ch. 76, and as to what constitutes an *ouster*, see *Cole on Ejectments* (published since that act), pp. 290-291 and full notes. From which it will appear that the practice is very much the same as in the American States.

¶ *Adams, Ejectments*, 186.

under the English doctrine prior to the statutes of 15th and 16th Victoria, tenants in common could not join in the same demise, but must declare separately, when a part may recover. But in Tennessee, New York, and other States, the practice was different even under the common law.*

The interest of the co-tenant was considered separate; neither has the right to demise the whole. But as has been stated, in many of the States this rule was disregarded and all the tenants might join in the demise, where a part may be recovered. These questions are now mostly regulated by statutes.

The epitome of the English practice given in the note,† shows in reality the substantial issue in the States under the more recent practice in trials to recover lands. The great question is, whether the statement made in the *complaint, declaration, petition, or writ*, be true or false. If true, then which of the claimants (where there are several) shall recover, and whether for the *whole* or a *part*; if for a part, what part. This is a plain and simple mode of stating all the issues which can arise in an action of ejectment.

Questions often arise in ejectment between *vendor* and *vendee*, *mortgagor* and *mortgagee*, and between landlord and tenant, and especially in reference to the “*notice to quit*,” but these will be reserved for another place.

Notice to Quit.—Perhaps it is best to state briefly at this point, the doctrine of “*notice to quit*.” Generally the notice to quit is necessary in cases where the occupant acquired the possession with the owner’s consent, but for no definite time.‡ Where the relation of landlord and tenant is not shown, the question of notice to quit does not arise.

But where the lease is to terminate on a day certain and fixed

* *Barrow v. Nave*, 2 Yerg., 228; 12 John. (N. Y.), 185.

† English practice by 15 & 16 Vict., ch. 76 (Common Law Procedure Act).

“The question at the trial shall, except in cases hereinafter mentioned, be, whether the statement in the writs of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part; and if to part, then to which part of the property in question.” The ejectment writ alleges the claimant’s title “to the possession, whereof A., B., and C., or some one of them, claim to be entitled.” This is the issue in all cases, and, of course, includes co-tenants. Cole on Ejectment, p. 285.

‡ *Stedman v. McIntosh*, 4 Ired. N. C. Law, 291; *Jackson v. Miller*, 7 Cow. (N. Y.), 747; *Gregg v. Von Phul*, 1 Wall., 274. See Sedw & Wait, chapter 13, §§ 372–414.

in the contract, then no notice is necessary before bringing the suit. The *contract* itself is notice.*

Tenancy from Year to Year.—Either party may determine a tenancy from year to year, at the end of any current year, by giving notice to quit half a year before the end of the year.†

Where a defendant has been allowed to occupy lands for several years without any definite lease or specific contract, he is a tenant from year to year and entitled to notice before the end of the year.‡ As to the definition of the different kinds of tenancy, such as tenancy from *year to year*, at *will*, at *sufferance*, etc., we will not here venture, as this is the familiar learning of the books.

One who comes in and defends as landlord in place of the tenant, cannot object that no notice was given to the original defendant. This application itself presupposes the tenant in the wrong in attorning to another, thereby disclaiming the tenancy between himself and the plaintiff.§

Vendor and Vendee.—The vendee holding under an executory agreement, and being put in possession by the vendor, his possession is rightful, and cannot be treated as a wrong-doer until after default, and if the vendor would bring ejectionment he should demand the possession before doing so.||

The vendee may, however, forfeit his right to the possession by failing to comply with the terms of the sale, and thereby making his possession tortious, and there is an immediate right of action with demand or notice to quit.¶

A different rule prevails in England, where it is held that the

* *Ellis v. Paige*, 2 Pick. (Mass.), 71, and note, reviewing the cases; 5 Tex., 248; 28 Mo., 65; *Cobb v. Stokes*, 8 East, 358; 74 Ind., 108.

† English rule.

‡ *Hemphill v. Giles*, 66 N. C., 512; 1 Johns. (N. Y.), 322; 3 Zab. (N. J.), 447.

§ *Foust v. Trice*, 8 Jones, N. C. Law, 490; *Wissenhunt v. Jones*, 78 N. C., 361.

|| *Carson v. Baker*, 4 Dev. N. C. Law, 220; 13 East, 210; 51 Miss., 560; 53 Barb. (N. Y.), 155; 14 Ill., 91.

¶ *Gregg v. Von Phul*, 1 Wall., 274; 16 Ohio, 489; *Burnett v. Caldwell*, 9 Wall. U. S., 290; 32 Ill., 173; 24 Gratt. (Va.), 512; 39 Ga., 197; 5 Minn., 178; 40 Ga., 32; *Ross v. Van Aulen*, 13 Vroom (N. J.), 49.

vendor having put the vendee in possession cannot without proof of demand of possession sustain ejectment.*

The English rule has been followed in Virginia.†

Vendee under a Void Contract.—Where the defendant was in possession under a parol contract void by the statute of frauds, and refused to pay the purchase-money, or to deliver up the possession, it was held that he was in no sense a tenant so as to entitle him to notice or demand to quit.‡

Mortgagor and Mortgagee.—The mortgagor before bringing ejectment against the mortgagee should give notice to quit, for he is in possession by the consent of the mortgagee.§

“But the general rule in such States as permit a mortgagee to invoke the remedy of ejectment is, that he may recover the possession of the lands from the mortgagor, after default, or the day of payment has passed, without notice to quit, the mortgagor being considered as a tenant at sufferance.”||

Notice by Tenant to Landlord.—The relations of landlord and tenant are mutual, and the rules and regulations as to notice to quit are, of course, similar, *mutatis mutandis*, to those by which the notice from the landlord is governed. *Parol* notice is sufficient, but the general practice of giving written notice is much better.

As to the *evidence* in ejectment, the field is broad and the range almost without limit. In ejectment cases, the evidence may begin with the evidence of a single declaration of a deceased person, and end with the evidence of the laws, habits, and customs of a foreign nation!

Thus in *Kelley v. Jackson*,¶ the question before the court being the validity of a Spanish grant, the laws, customs, and

* 13 East, 210.

† 24 Gratt., 512; 18 Gratt., 475–505.

‡ *Chilton v. Niblett*, 3 Hump. (Tenn.), 404; *Den v. Webster*, 10 Yer., 513. See *McClung v. Echols*, 5 W. Va., 204.

§ *Jackson v. Laughhead*, 2 Johns. (N. Y.), 75.

|| *Sedw. & Wait*, § 397; *Fuller v. Wadsworth*, 2 Ire. N. C. Law, 263; 26 Ill., 9; 18 Vt., 346.

The statutes of many of the States have regulated the time of notice as to all kinds of tenancies, and of course the statute in each particular State must be followed. See Statute of North Carolina (ch. 64, sec. 9), *Battles' Revisal*.

¶ *Kelley v. Jackson*, 6 Peters, U. S. R., 632.

regulations of the Spanish Government in reference to the issuance of grants was admitted in evidence. *Foreign* laws being the subject of proof like other facts.

But a large proportion of the questions of evidence will be found in the chapters on "First Link," "Title Deeds," "Boundary," "Limitations," "Adverse Possession," "Notice," "Priority," "The Separate Estate," "Trusts," etc. The *law* of these chapters embodies almost all the laws of evidence in regard to titles to land, both in law and equity.

Auxiliary Relief, Injunctions, Receivers, etc.—It often happens in the interest of justice, that pending a suit to try title and the right to the possession of land, the powers of a court of equity are invoked to prevent irreparable damage. This branch of relief in some of the States is inadequate, imperfect, and susceptible of much abuse. And the instances where an auxiliary relief should be granted depend so much upon the peculiar facts of each case as it may arise, that it is difficult to formulate a general rule. Perhaps a thorough idea of the jurisdiction of equity in granting relief, such as the staying of waste, granting injunctions and appointing receivers, in what cases, under what circumstances, for what grievance, etc., will indicate more decidedly than anything else when auxiliary relief should be granted, pending a trial of title. The possession of land, especially in England, is regarded as peculiarly sacred, and hence an indisposition to disturb the possessor of lands before a final determination of the issue regarding the title.

And there exist well-founded objections to a premature adjudication of conflicting titles, based on *ex parte* affidavits, as a foundation for the appointment of receivers, issuing orders of restraint, etc. The defendant in such cases may in the result be greatly damaged and wronged. On the other hand, the withholding of this provisional relief often results in great hardships and loss upon parties *out of possession*.

In these questions, one important consideration is, how long has defendant been in possession, under whom did he enter, under what title does he hold, and whether the possessor is a trespasser or intruder, and the question of insolvency always has a controlling influence. And especially if the defendant has been clothed with

the possession by the plaintiff, that feature should exert an important influence in granting provisional relief.*

If the party in possession is a *bona fide* claimant, with a *prima facie* and reasonable showing of title, he should not be turned out of possession, or his rights limited on a slight *ex parte* suggestion of an opponent who may bring suit even in the best of faith. At the same time where there is a *contest*, and the title in doubt, the party in possession should not be allowed maliciously or wantonly to do acts which might result in irreparable mischief to the *true owner*. Says our author from whom we quote: "Proof of insolvency of the defendant, which bears so important a part in applications for relief of this kind, is not always a true test; for the injuries inflicted are often *damnum absque injuria*."

It may be well to look to the doctrine as administered in a court of equity acting as a separate jurisdiction. On a bill to stay waste and to enjoin the party in possession from doing certain acts, the Supreme Court of North Carolina, in the case of *Bogey v. Shute*,† said: "Such a bill cannot be sustained against one in exclusive possession, claiming colorably, at least, the absolute estate, until the plaintiff has established his title at law, or, at all events, an injunction can be granted only when the plaintiff is endeavoring to establish his title at law, and until he should have a reasonable time allowed for that purpose, . . . for the court of equity acts in aid of the law."

In *Irwin v. Davidson*, *supra*, the same court said: "Equity takes no jurisdiction of a mere *trespass*, not even by granting a temporary injunction. But it is admitted, that in the case of mines, timber, and the like, when the trespass consists in acts by which the substance of the estate is destroyed or carried off there is an established exception, and that injunction may be granted to restrain continued commission of trespass, upon the ground that it is an injury of the nature of destructive waste and irreparable mischief to the substance of the inheritance."

Equity will not try the legal title, but comes in aid of the court of law in cases of this character.

Under this doctrine the following cases were held not to author-

* Sedw. & Wait, §§ 631-632. See chapter 23, of that work.

† *Bogey v. Shute*, 4 Jones Eq., 174, citing *Irwin v. Davidson*, Iredell Eq., 311.

ize an injunction pending the action to try title. In *McCormick v. Nixon*,* the defendant in possession was merely cutting timbers and turpentine trees for building and fencing, etc. And in *Gause v. Perkins*,† the alleged waste consisted in defendants being about to box and work turpentine trees for turpentine, and cut timber, staves, etc., on land being fit only for this product; and in both these cases the injunction was disallowed, it not appearing satisfactory to the court that the defendants were insolvent and unable to respond in damages. The court does not say that the injunction would be sustained if *insolvency* had appeared, but this is the inference from the opinion.

In an English case, of *Chalk v. Wyatt*,‡ the defendant was removing earth, shingles, and stones from under the bank belonging to plaintiff, which protected his land against the irruptions of the sea; Lord Eldon granted the injunction, but said he would not have done so if the plaintiff had not established his right at law to the property by a previous suit. So it will appear that courts of equity were disinclined to interfere with the defendant in possession, until the plaintiff had either established his right at law, or was proceeding to do so by a suit at law. And it was well settled that if the party has brought suit at law, and it appears to the court that it is necessary to protect the property, that the damage likely to follow cannot be compensated in damages, or if it could, the defendant cannot respond owing to insolvency, or that the mischief is irreparable, the court of equity would stay the hand of the defendant until the plaintiff had a reasonable time to prosecute his suit for title.

Under this doctrine the court of that State, in a very late case,§ sustained the granting of an injunction and receiver at the instance of the *defendant* against the *plaintiff*, who had taken possession after bringing his suit. This was a novel case, but the

* *McCormick v. Nixon*, 83 N. C., 113.

† *Gause v. Perkins*, 3 Jones Eq., 177, citing *Thompson v. Williams*, 1 Jones Eq., 176. See *Jones v. Boyd*, 80 N. C., 258; *Baldwin v. York*, 71 N. C., 463.

‡ *Chalk v. Wyatt*, 3 Mer., 688.

The same general doctrine is announced in later cases in the State of North Carolina, although one was in reference to a *nuisance*, and the other a contest between the upper and lower proprietors on a stream. *Dorsey v. Allen*, 85 N. C., 358; *Walton v. Mills*, 86 N. C., 230.

§ *Horton v. White*, 84 N. C., 297.

law is rightly decided. In this case C. J. Smith says: "The present system, containing in a single action all the essential attributes and all the auxiliary powers belonging to a suit in a court of law and a court of equity, admits of remedies and orders found necessary during its progress for the relief of both parties, and for the preservation of the property in litigation." At common law if the plaintiff, after bringing suit, acquires the possession of the land, it had the effect to terminate the suit, when brought to the attention of the court by a plea in abatement by the defendant since the last continuance.*

The defendant would then have to bring suit. But, in the case of *Horton v. White*, the suit was allowed to proceed for the purpose of trying title; and it appearing that the plaintiff was insolvent, and that he was doing acts tending to irremedial damage, the court sustained the appointment of a receiver and a restraining order. So in those States where the law and equity jurisdiction are blended, the court will probably do in cases of this kind what the court of equity would have done, and being governed by the same general principles.

Say Messrs. Sedwick & Wait: "Provisional or auxiliary relief by injunction is regarded with greater favor by the courts than applications for the appointment of a receiver, for this remedy does not change or disturb the possession. The propriety of granting injunctions to restrain trespass, waste, or kindred injuries, pending the action to try the title, and recover possession of the land, is quite generally recognized. . . . In some of our States, where legal and equitable jurisdictions are united, this species of relief may be had in the action itself; while in other States a bill in equity is resorted to, the practice being substantially the same as an application for a receiver."†

* *Johnson v. Swan*, Busb. (N. C.), 335; *Thompson v. Red*, 2 Jones, 412; *Horton v. White*, *supra*.

† Sedw. & Wait, "Trial of Title to Land." See the following additional cases as to when an injunction, pending trial to try title, will be allowed: *Reemer v. Johnke*, 37 Wis., 258; *Haigh v. Jaggar*, 2 Collyer's Rep., 231; *Talbot v. Scott*, 4 Kay & Johns., 96; 6 Nevada, 261; *More v. Massina*, 42 Cal., 590; *Spear v. Cutter*, 5 Barb. (N. Y.), 486, and cases cited; *United States v. Gear*, 3 How., 120; 45 Penna. St., 455; 54 Ala., 180; 30 Ill., 481; 15 Conn., 556; 20 Kansas, 647; 4 N. Y., 110; 3 Bland (Md.), 180 (several of the last cases have reference to injunction by mortgagee against mortgagor).

In California the plaintiff, without any allegation of insolvency, may seek, in addition to the recovery of the premises, an injunction restraining the commission of waste, such as the cutting, destroying, and removing growing timber, pending the action. But this ground of equitable relief should be stated in the complaint distinct from the other allegations upon which the judgment at law is sought.*

It is not usual to restrain the defendant from using the land in the ordinary course of agriculture, or from erecting buildings or clearing timber for that purpose, nor from the ordinary uses of the land to which it is adapted.

Ejectment Bill.—Some of the States, under statutory authority, allow what is called an "ejectment bill," which is in the nature of a bill to remove a cloud from the title; but going further than a court of equity had gone under that head of equity.

Thus, in Tennessee, a bill will lie to declare a deed a cloud, and to cancel one that is void, although the defendant is in possession, and the plaintiff has the legal title and might sue.†

Receiver.—The general rule is, that the appointment of a receiver, *pendente lite*, rests in the sound discretion of the court, and is usually granted only at the instance of a party having an acknowledged interest, or strong presumption of title. There must be reasonable probability of the plaintiff's success, and the subject-matter of the suit must be in danger.‡

It has been shown that in North Carolina the court sustained the appointment of a receiver on application of the defendant in ejectment, the plaintiff having sued *in forma pauperis*, and, pending the suit, took possession.§

As against the legal title, the uniform rule is, that the court will interpose with reluctance, and only in case of fraud clearly proved, and danger to the property; or destructive or malicious waste; stripping the land of timber; pulling down buildings;

* *Natoma Water and Mining Co. v. Clarkin*, 14 Cal., 544.

† *Almony v. Hicks*, 3 Head, 39; citing *Jones v. Perry*, 10 Yer., 83; 2 Yer., 524; *Story's Eq. Jur.*, § 699, § 705.

‡ 1 Johns. Ch. (N.Y.), 57; 12 Florida, 300; 49 Ga., 93; 46 Miss., 120; *Sedw. & Wait*, § 613.

§ *Horton v. White*, 84 N. C., 297. See *More v. Massina*, 32 Cal., 590; 26 Cal., 447; 21 Cal., 165; 51 Wis., 92.

actual danger of total loss of rents. Some equitable principle must be shown to "affect the conscience of the defendant."*

In New York the courts almost entirely ignore the practice of appointing a receiver in ejectment before judgment.† And Sedwick & Wait, writers from that State, thus criticise the same: "That the cases in New York are almost uniform in holding that a receiver cannot be appointed in ejectment before judgment, is very remarkable, and scarcely creditable to the jurisprudence of the State. Litigations over titles are necessarily protracted, and a system of procedure which permits unscrupulous and irresponsible possessors of land to enjoy the profits, and waste the subject-matter of contention, in practical defiance of the courts and the owners, should be corrected."‡

Reasons may be shown for appointing a receiver in some instances, *after* judgment, which would not apply pending the litigation. What is here said of *injunctions* and *receivers* is in reference only to ejectment suits, while many of the reasons and principles may apply to other actions in the courts.

BRIEF OF DECISIONS UNDER THE NEW YORK CODE.

As the code of New York has been taken as the model for many of the other States it may prove profitable to the student and practitioner to note the adjudications by the courts in that State, made in regard to real estate trials, much of which is gathered from Bliss's *Annotated Code*, published in 1880. It will be observed that many of these decisions are so general in their application that they may be taken as elementary principles, applicable in the main to all localities of the United States.§

Ejectment and Damage.—In an action to recover land, or the possession thereof, the plaintiff may demand in his complaint, and, in a proper case, recover damages for withholding the property. The words "real property" are coextensive with lands,

* Sedw. & Wait, § 616; cases cited.

† Thompson v. Sherrard, 35 Barb., 593; Burdell v. Burdell, 54 How. Pr. (N. Y.), 91 (decided in 1877); Guernsey v. Powers, 9 Hun. (N. Y.), 78; see 22 Hun., 194; when not in Georgia, see 50 Ga., 370; when not Illinois, Mapes v. Scott, 4 Brad. (Ill.), 268.

‡ Sedw. & Wait, § 632.

§ Bliss's Code, § 1496.

tenements, and hereditaments. Complaint not stating cause of action for rent and profit, cannot, on or after trial, be so amended as to insert it.*

Who can Maintain Ejectment.—Under a naked contract to purchase, which is silent on the subject of possession, the purchaser acquires no right to the possession and no right of entry.†

Personal representatives of a lessee for years, or of his assignee, may maintain ejectment, as they are entitled to possession.‡

Ejectment will not lie against a mortgagee, in possession under the mortgage after default, to recover the premises before redemption;§ and, notwithstanding the mortgagee has had rents and profits enough to satisfy the mortgage, until a court of equity has had an accounting, and rents applied.||

Ejectment by Husband and Wife.—1. In an action to recover the separate property, the wife must sue alone.

2. In a joint action by husband and wife for the recovery of land to which they claim title in right of the wife, no separate judgment can be given in favor of the wife and against the husband. They must recover jointly or not at all.¶

3. The wife may sue the husband for real property wrongfully detained by her husband. Whoever owns property, and entitled to the possession, can recover it at law against any wrong-doer, including her husband.**

4. Where a devise is alleged to be void, the heirs at law should bring ejectment, not an equitable action to construe the will.††

Joint Plaintiffs.—1. Two persons, each of whom claims the whole of the piece of land by a title hostile to that of the other, cannot unite as plaintiffs in ejectment against the party in possession, and set forth the title to each in a separate count.‡‡

2. There cannot properly be joined several plaintiffs claiming under distinct titles for distinct interests.§§

3. In ejectment for breach of condition subsequent, all the original grantors, or their heirs, should join.||||

* Larned v. Hudson, 57 N. Y., 151.

† Kellogg v. Kellogg, 6 Barb., 116

‡ Mosher v. Yost, 33 Barb., 277.

§ Randall v. Raab, Abb. Pr., 307.

|| Hubbell v. Moulson, 53 N. Y., 225.

¶ Barton v. Draper, 5 Duer, 130.

** Wood v. Wood, 18 Hun., 350; *contra*, Gould v. Gould, 29 How., 441.

†† Post v. Hover, 33 N. Y., 593.

‡‡ Hubbell v. Lerck, 58 N. Y., 237.

§§ People v. Mayor, 10 Abb., 144.

|||| Cook v. St. Paul's Church, 67 N. Y., 594.

For what Ejectment Lies.—1. The action will lie whenever a right of entry exists, and the interest is of such a character that it can be held and enjoyed, and possession thereof delivered in execution of a judgment for its recovery.*

2. The claim of title, or of some interest in the premises spoken of in the statute, must be such a claim as that, if it were reduced to possession or enjoyment, would constitute an actual occupation.†

Not for anything lying merely in grant, not capable of being delivered in execution, as an advowson, rent, common appendant or watercourse; nor for an incorporeal hereditament.‡

Proof that the property was conveyed to the plaintiff by a person not shown to have been in possession, or to have title, was not sufficient to show title.§

Before plaintiff can bring suit to recover land conveyed by him while a minor, he must do some act of disaffirmance, and this act of disaffirmance must be alleged in the complaint.||

What Necessary to Maintain the Action.—Ejectment tests not only the right of possession, but the title under which the right of possession exists, whether in fee, for life, or for years.¶

Receiver and Injunction.—The court will not, pending an action of ejectment, at the instance of the plaintiff, appoint a receiver of the rents of the premises in suit.** Receiver cannot be appointed before judgment.††

In an action for rents and profits adjudged in an action of ejectment there is no legal objection to the appointment of a receiver.‡‡

The Answer.—Where plaintiff avers “title,” unlawful withholding, etc., etc., an answer which merely denies possession and unlawful withholding does not put in issue plaintiff’s title. If defendant intends, on the ground of adverse possession, at the time, “to put in question the validity of the deed to plaintiff,” he should set up title in himself or title out of plaintiff. Therefore no proof of adverse possession is competent under this pleading.§§

* Child v. Chappell, 9 N. Y., 246.

† Ibid.

‡ Northern Turnpike Co. v. Smith, 15 Barb., 355.

§ Gardner v. Heart, 1 N. Y., 528.

¶ Voorhees v. Voorhees, 24 Barb., 150.

|| Cagger v. Lansing, 64 N. Y., 417.

** Thompson v. Sherwood, 35 Barb., 593. See *contra*, Ireland v. Nickols, 37 How., 222; 7 Rob., 476.

†† Burdell v. Burdell, 54 How., 81.

‡‡ Sheridan v. Jackson, 5 Weekly Digest, 443.

§§ 30 Barb., 183.

Defendant may interpose equitable defence; such as an estoppel.*

But to avail himself of such defence it must be pleaded.†

The vendor suing vendee, the vendee may have specific performance on part of vendor.

Under a general denial the defendant may show title out of the plaintiff.

Damages are recoverable up to day of trial.‡

Expiration of Title Pending Action.—If the plaintiff would have been entitled to recover but for expiration of his title, he is entitled to damages for withholding up to the time when his right or title expired.§

Verdict or Report to Specify Estate.||—The code of New York requires the verdict, report, or decision, to state what title, whether in fee or for life, or for a term of years, or for whose life it is, and specify the duration of the term, if the estate is less than fee.

When Judgment a Bar.—A former judgment may be an estoppel, though no land is described in the record, or the description is incomplete and in part unintelligible, if parol evidence is given showing what lands were the subject of litigation.¶ Also to show what was litigated, if it does not contradict the record.**

Landlord.—When the action is against the tenant and he gives notice thereof to his landlord, the latter, in the absence of proof to the contrary, will be deemed to have assumed the defence, and is bound by the judgment, and an action may be maintained against him for mesne profits, without any other recovery in ejectment against him.††

The measure of damages is that which would obtain in assumpsit for use and occupation. *Interest* may be included in a fair annual value.‡‡

* *Miller v. Platt*, 5 Duer, 272; *Chase v. Peck*, 21 N. Y., 581.

† *Raynor v. Timerson*, 46 Barb., 518; *Dewey v. Hoag*, 15 Barb., 365; *Blair v. Claxton*, 18 N. Y., 529.

‡ *Bedell v. Shaw*, 59 N. Y., 46.

§ *Rensselaer v. Owen*, 48 Barb., 61.

|| *Bliss's Code*, § 1519.

¶ *Wood v. Jackson*, 8 Wend., 9.

** *Briggs v. Wells*, 12 Barb., 567.

†† *Van Alstine v. McCarty*, 51 Barb., 326.

‡‡ *Vandervoort v. Gould*, 36 N. Y., 639.

A very important opinion is that of *Thompson v. Bower*, 60 Barb., 463, in which the nature and foundation for the action of mesne profits are discussed.

In trespass for mesne profits a *bona fide* purchaser may be allowed the value of permanent improvements made in good faith.*

In the case of *Vandervoort v. Gould* the court say: "The allowance of interest on the fair annual value of the use and occupation of the premises during the period they were wrongfully withheld, was a proper subject for consideration of the jury in determining the amount of damages the plaintiff was entitled to recover."

Such damages are generally designated mesne profits. That is to say, what the premises were reasonably worth annually, *with interest to the time of trial*.

A disseisee of land cannot maintain an action against the disseisor or one acting under him for an injury to the premises while he is out of possession, but after re-entry he can recover for any such injury and for rents and profits.† The statute of New York says: "A recovery in ejectment is conclusive against the defendant, and all persons claiming through or under him, such party, by title accruing after the commencement of the action." If the landlord had notice this binds him.‡ In an action for mesne profits the defendant, who is bound by the judgment in ejectment, cannot give in evidence any matter which might have been given on the trial of ejectment.§ If, however, in the case of the landlord, he had notice of the action of ejectment he can contest the title of the plaintiff. In *Finnegan v. Carnaher*, 47 N. Y., 497, it is held that if the landlord, under the old practice, should defend by the

* *Jackson v. Loomis*, 4 Cow., 168.

† *Van Alstine v. McCarty*, 51 Barb., 332. In this case plaintiff brought an action against Bronson, the tenant. The tenant gave notice (as required by the statute of New York), and it was held that this made the judgment conclusive on the landlord and made him liable for rents and profits.

‡ *Adams Ejectment*, 337; 2 *Greenleaf Ev.*, §§ 333, 334; and in this case the landlord actually received the rents of the tenant, and this made him liable at common law, without regard to the judgment. *Morgan v. Varick*, 8 Wend., 587; *Leland v. Tousey*, 6 Hill, 328; 8 *Wheaton*, 80; 11 *Mass.*, 569.

§ 3 *Johns*, 481.

tenant, he should pay costs on the return of the sheriff that nothing could be made of the tenant.

Less than this would not give the plaintiff full and complete indemnity for the injury to his rights. The measure of damage is that which obtains in assumpsit for use and occupation.* "That, in our judgment, the court might with propriety have instructed the jury that justice to the plaintiff demanded an allowance of interest on the fair annual value of the *use of the premises*, from the possession of which he had been wrongfully excluded."

Who Defends in Action of Ejectment.—Where the complainant demands judgment for immediate possession, if the land is actually occupied, the occupant thereof must be made the defendant.† If not so occupied the action must be brought against some person exercising acts of ownership thereof, or claiming title thereto, or an interest therein, at the time of the commencement of the action.

If no one lives on the land, and a servant cultivates for his employer, the latter is the one to sue.‡ "Ejectment for vacant premises may be brought against one exercising acts of ownership or claiming title;" "but the claim must be more than an idle declaration that he owns the land."§

Change of Occupancy Pending Action.—Where pending the action for the recovery of real property, all the right, title, and interest of defendant in the premises is, by operation of law, transferred to another, who enters into and holds possession thereof, the original cause of action does not continue against the succeeding occupant and cannot be substituted as a party.||

Statute of Limitations.—When the statute once begins to run no subsequent disability will arrest its operation.¶ For example, if the statute begins to run while the testator or deviser is living,

* *Holmes v. Davis*, 19 N. Y., 458. † *Bliss's Annotated Code*, § 1502.

‡ *Shover v. McGraw*, 12 Wend., 458.

§ See *Taylor v. Crane*, 15 How., 358; *Banyer v. Empie*, 5 Hill, 48; *Lucas v. Johnson*, 8 Barb., 244; *Abeel v. Van Gelden*, 36 N. Y., 513; *Foggate v. Herkimer Manufacturing Co.*, 12 N. Y., 580; *McGregor v. Comstock*, 16 Barb., 427.

|| *Mosley v. Albany North R. R. Co.*, 14 How., 71.

¶ *Jackson v. Moore*, 13 Johns. (N. Y.), 513; *Flemming v. Griswold*, 3 Hill, 85; *Becker v. Van Valkenburg*, 29 Barb., 319; see *Harris v. McGavern*, 99 U. S. Rep., 161.

his death and the descent of the land to the devisee will not arrest the running of the statute.

The Action is Local.—The following actions must generally be tried in the county in which the subject-matter of the suit is situated, or some part of it: 1. For the recovery of real property or an interest therein, or for injuries to the same. 2. For partition of lands or real estate. 3. For the foreclosure of a mortgage on real estate. If, however, such real estate be situated in different counties, then in either county.* The codes generally follow the common law in regard to the venue in actions concerning real property.

CHAPTER III.

ACTION FOR MESNE PROFITS AND DAMAGES.

Mesne Profits in Ejectment.—"The mesne or intermediate profits of land are those received while the property is withheld from its rightful occupant; and when he recovers possession the right to the mesne profits follows his recovery."†

It has been seen that the modern action of ejectment was derived from the writ *ejectione firmæ*, which was a simple writ of trespass, by which the lessee or tenant for years could recover damages consequent upon eviction and loss of possession. This was the exclusive relief, as the tenant was not *restored* to the possession. He was not entitled to a real writ for such a precarious interest.

It is readily observed that in case of the total insolvency of the defendant that *this* remedy was inadequate, and this grievance necessitated the important innovation of allowing the tenant to recover the unexpired term and the possession. This innovation

* See the following authorities: Colorado Code, § 22; Cal. Code, § 18; N. Y. Code, § 123; Nash's Ohio Pl., § 16, 17; Oregon Code, § 41; Iowa Code, § 2795; N. C. Code, § 66.

† Sedwick on Damages (7th ed.), vol. i., p. 250.

made the action more like a real action, and the principal recovery under the early action became a mere incident. And when the fiction as to *parties* and the *lease* were adopted, the damages became merely *nominal*.*

The Rights of the Owner of the Land.—The successful plaintiff in the action of ejectment is entitled: 1st. To the land for which he has shown title. 2d. To the mesne profits during the time the real defendant held possession. 3d. To damage for actual injury to the land, such as cutting and destroying timber, pulling down fences, and destroying growing crops. And this sum due the plaintiff in mesne profits and damage may be subject to an abatement, recoupment, or discharge, by the claim of the defendant for permanent and valuable improvements made *bona fide* and *before suit brought*.

We have seen the remedy, and the enforcement of the same through the writ of possession to obtain the land, and the questions which arise next in order, after the plaintiff is placed in possession, are those pertaining to the indemnity to the plaintiff for the loss of the possession, and of the defendant for valuable improvements made in good faith.

This action for mesne profits and damage cannot be maintained until the plaintiff in the suit has obtained the possession, either under the process of the court or by a peaceable entry by himself after the recovery in ejectment.

If it appears that the plaintiff is out of possession, the action cannot be maintained, the action being founded on the fiction of law that the disseisee having been restored to the possession is presumed to have occupied during the period of disseisin.†

* Reeves's History of Eng. Law (ed. 1880), vol. iv., p. 241. On this point consult Adams on Ejectment (4th Am. ed.), p. 444; Stearns on Real Actions, p. 402; Davis v. Debit, 25 Miss., 446; 55 Miss., 390.

† Trubee v. Miller, 48 Conn., 347; Jackson v. Loomis, 4 Cow. (N. Y.), 168; Carson v. Smith, 1 Jones N. C. Law, 106; Bockes v. Lansing, 74 N. Y., 437; Stancil v. Calvert, 63 N. C., 616; Murphey v. Guion, 2 Murph. (N. C.), 238; Poston v. Henry, 11 Ire. N. C. Law, 361; Miller v. Melchor, 13 Ire. Law (N. C.), 439; Nelson v. Allen, 1 Yerg. (Tenn.), 360.

The Supreme Court of North Carolina, in the case of Stancil v. Calvert, 63 N. C., 616, held that the party relying on a judgment in ejectment was compelled to obtain the actual possession before bringing suit for mesne profits, and that the "confession of lease, entry, and ouster," did not avoid the opera-

Parties Plaintiff.—Under the old practice, the action for mesne profits was brought in the name of the lessor of the plaintiff, and, according to some of the authorities, in the name of the nominal plaintiff; in either case, it was regarded as the suit of the lessor.*

We have just shown that the plaintiff must actually acquire possession. And, whoever can recover in ejectment can sue for mesne profits and damage, whether it be a *cestui que trust*, or municipal corporation, or other person. A right to the land essentially implies a right to the profits. Lord Coke has said: "What is land but the profits thereof."†

Under the general practice, now, the real party in interest is the party to sue in all cases.

Parties Defendant.—The proper and necessary party defendant in this action is the party who has wrongfully withheld the possession and appropriated the profits, or committed the damage. One who comes into possession during the pendency of the suit is bound by the judgment, and liable for mesne profits for the period which he had the possession.‡ The action will lie against infant defendants, though never in possession except by guardian.§

In case of the death of the defendant pending an action to recover the land, and his heirs are made parties, their liability for mesne profits is limited to the rents and profits during the period of their own possession after his death; they cannot be held liable for profits which they never received, nor can the tort of the ancestor be predicated of the heir.|| And it is supposed that any person may be sued for the mesne profits who connived at the action of the tenant, co-operated with, or received the rents from the

tion of this rule. In this case, C. J. Pearson bid farewell to the old litigants, John Den and Richard Fen, as the new practice (Code of 1868) had then gone into effect.

* Den v. Lunsford, Busb. N. C. Law, 401; Shadwick v. McDonald, 15 Ga., 392; Adams on Ejectment (4th Am. ed.), p. 330; Masterson v. Hagan, 17 B. Mon. (Ky.), 325; Sedw. & Wait, § 656.

† Co. Litt., 46; Green v. Biddle, 8 Wheat., p. 76.

‡ Bradley v. McDaniel, 3 Jones N. C. Law, 128; Willingham v. Long, 47 Ga., 540.

§ Molton v. Mumford's Heirs, 3 Hawks N. C., 483.

|| Cavender v. Smith, 8 Iowa, 360; Sedw. & Wait, § 658.

tenant in possession. The fact that the tenant has paid the rent to a disseisor is no defence to the claim of the true owner for the profits; and this is so, though he may have paid the same in good faith.*

It is held in Tennessee that the executor could not maintain the action for mesne profits, even where he was clothed by the will with power to sell lands and divide the proceeds, upon the principle that the rents and profits are incident to the ownership of the land, and the remedy belongs exclusively to the person having title to the land.†

In New York, however, it was held that where one from whom land had been wrongfully taken died before the recovery of possession, that the claims for damage and rents down to the death of the party went to the executor, and became a part of the personal estate.‡

Says Mr. Tyler, in his *Treatise on Ejectment*: "But the action for mesne profits may not only be brought against the original defendant in the ejectment suit, but it may be maintained against him who was the landlord in fact, who received the rents and profits, and resisted the recovery in the ejectment suit, although he was not a party to the suit, and did not take upon himself the defence thereof upon the record, but another did, as landlord. All persons who aid in, command, or procure a trespass, are themselves deemed in law to be trespassers, whether they are actually present or do the act through the instrumentality of their agents and servants. . . . Upon this reasoning it is held that it is competent to maintain the action for mesne profits against any trespasser, although not a defendant in the ejectment suit. If the party is the landlord of the parties in possession of premises recovered, or if he was in the reception of the rents and profits, or he resisted the plaintiff's title and possession, and co-operated in

* 48 Conn., 347; 57 Miss., 73; 8 Wheat., 1; 3 Jones Law N. C., 128; 8 Wend. (N. Y.), 587.

† Brown v. McCloud, 3 Head., 280.

‡ Hotchkiss v. Auburn, etc., R. R. Co., 36 Barb. (N. Y.), 600.

Where the tenant is sued, and he gives notice to the landlord, the latter is presumed to have assumed the defence, and may be sued for rents and profits without a judgment against him in ejectment. Van Alstine v. McCarty, 51 Barb., 326.

the acts of the tenant for this purpose, he is liable in the action for mesne profits and is a proper defendant in the action.”*

And this is the doctrine of the English courts.†

In North Carolina, on the death of the plaintiff, the executors were held entitled to the mesne profits and damages for waste up to the date of the death; while those which accrued subsequently went to the heirs and devisees.‡

Where the disseisor dies, the claim may, in some States, where there is no statute, be asserted against the personal representatives.§

Under the earlier procedure the claim for mesne profits being founded in tort, and enforced by an action of trespass, died with the person;|| but this has been changed by statutes in most, if not all, the States. By these statutes, most generally on the death of the defendant, the right to the mesne profits survives against the personal representative.¶

The Pleadings—Joinder of Actions, etc.—In regard to the pleading Mr. Adams says: “The plaintiff complains in it of his ejection and loss of possession; states the time during which the defendant (the real party) held the land, or took the rents and profits, and prays judgment for damages,” etc.**

Under the modern practice the premises should be described, the time stated when the defendant entered, and the length of time the premises were wrongfully possessed, and the value of the mesne profits; also the amount of damages sustained.

But, as the practice now generally adopted, the claim for rents and damages is *united* in the action for the recovery of the land.††

* Tyler on Ejectment, p. 842; *Chirac v. Reinicker*, 11 Wheat., 280.

† Hunter v. Britts, 3 Camp. N. P. R., 455; *Doe v. Harlow*, 12 Adolph. and Ell. R., 40; 4 Taunt. R., 720.

‡ King v. Little, 77 N. C., 138. See *Blight v. Ewing*, 26 Penna. Stat., 135.

§ Rhodes v. Crutchfield, 7 Lea (Tenn.), 518; 36 Barb. (N. Y.), 600.

¶ Stearns on Real Actions, p. 404; 60 Barb. (N. Y.), 463; *Evans v. Welch*, 63 Ala., 253.

¶ 71 Penna. Stat., 398; 63 Ala., 250.

** Adams on Ejectment, 446 (4 Am. ed.). In *Rhodes v. Crutchfield*, 7 Lea (Tenn.), 518, it was held that the administrator might waive the tort and sue *ex contractu* for mesne profits, and that this survives to the personal representative.

†† Sedw. & Wait, § 650; *Hecht v. Colquhoun*, 57 Md., 563; *Harrell v. Gray*, 12 Neb., 543; 88 Penna. Stat., 319; 53 Ind., 32; 19 Cal., 28; 24 Minn., 110; *Garner v. Jones*, 34 Miss., 505. See North Carolina Code, Battle's Revised, ch. 17, sec. 125, sub-sec. 5. See, also, statutes of the other States in regard to the “joinder of actions.”

The legislation varies in the different States, but generally it is at the election of the plaintiff to join the claim for mesne profits and damages with the action for the land, or to bring another action after the recovery of the land.

It is a matter about which judges and courts differ as to the propriety of joining these actions.

There is no doubt of the fact that this submission of such a multitude of issues to the jury tends to trouble and confusion. Under this practice the following issues have been known to be submitted to the jury in the same trial :

1. Has the plaintiff the title as claimed ?
2. Was the defendant in possession at the time of the commencement of the suit ?
3. What is the value of the rents ?
4. What damage has the plaintiff sustained ?
5. How long has the defendant held possession ?
6. What are the value of the permanent improvements made by the defendant ?

Now it will readily be seen that all these questions are before the jury in cases where the plaintiff claims *title, rents, and damage*, and the defendant denies possession *as alleged*, insists on *statute of limitations*, or a *presumption*, and claims compensation for *improvements*.

And the issues are too complicated. The claim for mesne profits embraces some of the elements of an equitable accounting, while the defendant's set-off for improvements often presents difficult questions as to what shall be considered improvements. Then the question of *possession* and statute of limitations present usually a complication of facts, circumstances, and conflict among witnesses. On this point it has been well said : " Juries must base their verdicts upon their memory of the testimony solely, and ejectment cases, in which the presentation of the testimony extends through several days, covering complicated transactions, are quite common. The questions involved in the trial of the title are often very intricate and difficult, and constitute, by themselves, all that the jury are competent to retain in memory and intelligibly consider. It is not possible, in the very nature of things, for the jury to creditably discharge their duty where a series of important issues, which might be easily separated, are

submitted together in a body for their consideration. While the practice of settling both the disputed title and the question of mesne profits and improvements in a single action is convenient, yet the issues should be separately considered by the jury; for, aside from the embarrassments incident to submitting a multitude of issues, a verdict for the defendant, of course, renders the testimony, as to mesne profits and improvements, valueless, and the necessity for the production of the testimony on that branch of the case is entirely uncertain until the main issue is determined."* The simple question of *title* and *profits* would not tend to such great confusion, but it must be understood that the defendant is allowed to present the issues favorable to *his* view of the proof, and thus we often have complete confusion.

Then the declaration or complaint, whether joined in the action for title or not, must set forth the claim for mesne profits, and also for damages; otherwise no judgment can be had for either, although the plaintiff may recover. Then the *rents* and *profits* do not form a part of the *damages* for withholding the property, but constitute a separate and distinct cause of action. Thus in a case where the complaint asked for a recovery of the land, with damages for withholding, and no statement of the time of occupation and claim for mesne profits, it was held error to admit proof of the same.†

It is true that in Massachusetts the demandant, in a writ of entry, is entitled to recover for the rents and profits, although not demanded.‡ In Maine, however, the practice is directly the opposite, the demandant being required to make claim for damages in the writ.§

Strictly speaking the action for mesne profits is in the nature of an action *quare clausum fregit*, and cannot be maintained without proof of the trespass. It differs from an action for use and

* Sedw. & Wait, Trial of Title to Land, § 651.

† Larned v. Hudson, 57 N. Y., 151. See Candee v. Burke, 10 Hun. (N. Y.), 350; Cagger v. Lansing, 64 N. Y., 417, 431; Holmes v. Davis, 19 N. Y., 488; Carman v. Beam, 58 Penna. Stat., 319; Ringhouse v. Keener, 63 Ill., 230.

A judgment for damage is clearly erroneous when there is no damage alleged in the complaint. McKinley v. Tuttle, 42 Cal., 570; Cannon v. Davis, 33 Ark., 56.

‡ Provident Institution v. Burnham, 128 Mass., 458; Statutes of Mass., 134, §§ 13, 14.

§ Pierce v. Strickland, 25 Me., 440; 36 Me., 440.

occupation in this, that the latter is founded upon a promise, express or implied,* while the former springs from a *tortious* holding. When the plaintiff sues for use and occupation strictly, he must prove the relationship of landlord and tenant, or some express or implied agreement between the parties.† An implied promise to pay rent could never arise out of a *hostile tortious holding* of the defendant, claiming in his own right or under some other than the plaintiff's title.‡ Notwithstanding these clear distinctions between *trespass* and an action for *use and occupation*, the authorities by a preponderance indicate that the action has now acquired the characteristics of an action *ex contractu*, rather than those of a pure *tort*. The decisions differ somewhat. Thus, in Illinois it is treated as an action of *assumpsit*.§ In New York it is practically an action for use and occupation.|| In Pennsylvania it is treated in reality as an action for use and occupation, and considered as a matter for account under the evidence.¶

In the case of *Camp v. Homesley*, the Supreme Court of North Carolina considered the action for mesne profits was substantially a continuation of the action of ejectment for the purpose of recovering the actual damages, and, therefore, whenever a person was allowed to maintain ejectment he could have trespass to complete his remedy.**

"The action for mesne profits, though in form an action of trespass, yet in effect it is to recover the rent."††

Then it is treated as an equitable suit, in which every equitable

* *Goddard v. Hall*, 55 Me., 579.

† *Sedw. & Wait*, § 652; *De Young v. Buchanan*, 10 G. & J. (Md.), 149; 13 Johns. (N. Y.), 489; 26 Miss., 94.

‡ *Sinnard v. McBride*, 3 Ohio, 264; *Harker v. Whitaker*, 5 Watts (Penn.), 474; 55 Me., 579.

§ *Ringhouse v. Keener*, 63 Ill., 230.

|| *Vandervoort v. Gould*, 36 N. Y., 639. The opinion in *Thompson v. Bower*, 60 Barb., 463, in which the nature of the action is discussed. In the case of *Vandervoort v. Gould*, *supra*, interest was allowed on the amount found to be due by way of mesne profits.

¶ *Blithe v. Ewing*, 26 Penn. St., 135.

** *Camp v. Homesley*, 11 Ire. (N. C.) Law, 211. See in accord *Bradley v. McDaniel*, 3 Jones (N. C.) Law, 128; *Miller v. Melchor*, 13 Ire. (N. C.) Law, 439; 48 Conn., 347; 1 Md., 55.

†† *Titlerson v. Vernon*, 3 Tenn. R., 539-547.

defence may be set up, this feature of the action being borrowed from the chancery practice on bills to account.* Chancellor Kent said: "The action for mesne profits is a liberal and equitable action and will allow of every kind of equitable defence."†

Co-tenants.—The successful co-tenant must take possession in a reasonable time after the recovery in ejectment. In one case a month was considered reasonable time, and the plaintiff was allowed to recover mesne profits from the date of the demise to one month after judgment.‡ It is said that if there is no proof of an ouster, except a denial of the plaintiff's title and right of entry in the answer, the plaintiff in ejectment can recover damages only from the date of the institution of the suit.§

The tenant is not charged with rent paid in permanent improvements on the land, such as clearing, fencing, etc.||

For what Periods Mesne Profits are Recoverable.—Damages and mesne profits can only be computed from the time when the title was cast upon the plaintiff, or the time when his right of possession accrued.

An execution purchaser is only entitled to judgment for mesne profits from the date of the sheriff's deed.¶

The defendant will not be held liable for mesne profits taken prior to his own entry, by those under whom he claims,** but can only be charged for the rents and profits accruing during the time he was actually in possession of the disputed land in the character of a disseisor.

If the defendant claims for improvements made by those under whom he holds, then he will be liable for mesne profits, and they should be deducted from the improvements.††

In Georgia it is held that when, in an action of ejectment, a

* 82 Penn. St., 102; 57 Miss., 73; 2 Johns Cas. (N. Y.), 438; 6 Watts (Penn.), 427.

† Murray v. Gouverneur, 2 Johns Cas. (N. Y.), 442; see Jackson v. Loomis, 4 Cow. (N. Y.), 168. As to the view taken by the Supreme Court of the United States as to the action for mesne profits, see New Orleans v. Gaines, 15 Wall., 624. See also Avent v. Hord, 3 Head. (Tenn.), 459.

‡ Hare v. Fury, 3 Yeates (Penn.), 13. § Miller v. Myers, 46 Cal., 535.

|| Walker v. Humbert, 55 Penn. St., 407; Reed v. Jones, 8 Wins., 421, 464.

¶ Clark v. Byrean, 14 Cal., 624.

** Gardner v. Grannis, 57 Ga., 539; Jackson v. Dyer, 31 Ark., 334.

†† Gardner v. Grannis, 57 Ga., 539.

third person goes into possession after the commencement of the suit, and such third person is made a party defendant, the date of the commencement of the original suit is to be taken as the date of the commencement of the suit against such new party, and he is liable for mesne profits from that date.*

The usual plea of the defendant is the general issue or not guilty, and if the plaintiff declare against the defendant for mesne profits for a period longer than is allowed by the statute of limitations, the defendant having pleaded the statute may protect himself to that extent.

If the plaintiff seeks to recover the mesne profits which accrued antecedently to the day of the demise in the declaration in the ejectment, he must produce the regular proof of the title, as the judgment in ejectment is not admissible to prove title anterior to the date of the demise. The recovery in ejectment binds parties and privies. The judgment is conclusive evidence in the action for mesne profits against the tenant in possession, when he has been duly served with notice in ejectment, whether he appears and takes upon himself the defence, or suffers judgment by default to go against the casual ejector. It is well settled that the defendant in the action for mesne profits will not be permitted to set up any defence which would have been a bar to the action of ejectment. This he cannot do, though he may have a better title than the plaintiff.† But the rule is otherwise when the action is brought against third persons, that is, persons who are neither parties nor privies to the record. In such case the judgment in ejectment is not conclusive, and the defendant may controvert the plaintiff's title at large.‡

* *Willingham v. Long*, 47 Ga., 540. It is not like the case of making a new lessor after the suit has begun, for in this case the statute runs against him, and as to the new party it is a new suit; until he brings his suit or is brought in no recovery can be had on his title. 47 Ga., 540, *supra*.

† *Tyler on Ejectment*, p. 844, 845; *Benson v. Matsdorf*, 2 Johns. R., 369; *Jackson v. Randall*, 11 Johns. R., 405.

‡ *Tyler on Ejectment*, p. 845. Perhaps the record in ejectment is not even admissible as evidence against strangers. *Leland v. Tousey*, 6 Hill's R., 328.

Such record is no evidence against any one other than the defendants named therein, or persons claiming under them by title accruing after the commencement of the ejectment suit. The fact that persons who are not parties to an ejectment suit undertake the defence of such suit and fail therein, will not furnish the slightest evidence of the plaintiff's title or possession in an action

However, it would seem that the plaintiff could use the record in ejectment in all cases to prove *possession*. This he could do by sufficient evidence *in pais*, and if the *possession* has been obtained under judgment of law, he ought to be allowed to show it; but not to prove title, as against a stranger who is not estopped by the judgment.

The statute of limitations as to mesne profits do not begin to run until a recovery is had in ejectment.*

But in a very recent case, the Supreme Court of Tennessee, Judge McFarland delivering the opinion, holds that the personal representative of the plaintiff in ejectment might waive the *tort*, and sue upon the promise implied in law to pay the value, in which the statute of six years would bar, for the reason that, if the *tort* is waived, and the suit is upon an *implied promise*, the action could be brought as well before the judgment in ejectment as afterward, and therefore if six years had elapsed before the personal representative should sue the statute was a complete bar.† The right of the successful party to recover rents and profits and damages is usually limited to six years in this country.

Perhaps the modern statutes giving the *option* to the plaintiff to join the claim for mesne profits with the action for the land does not affect the statute of limitations, the right of action still being deemed to exist in law at the termination of the trial of the title. The rule may be different in Georgia, where no subsequent action to recover mesne profits is allowed; the claim is required to be joined with the action for the land. Under the practice in Georgia it has been held, that if part of the claim for mesne profits is barred by the statute of limitations, the statute to be availed of must be pleaded.‡

against such person for mesne profits. Such person may now deny the title. *Ainslie v. Mayor of New York*, 1 Barb. R., 158; *Poston v. Henry*, 11 Ire. (N. C.), 301. A judgment against the wife is no evidence in an action for mesne profits against husband and wife. *Denn v. White*, 7 Term. R., 112.

* *Avant v. Hord*, 3 Head. (Tenn.), 458; *Murphy v. Guion*, 2 Murph. (N. C.), 238.

† *Rhodes v. Crutchfield*, 7 Lea (Tenn.), 518.

Where no statute of limitations exists the plaintiff can recover from the time the right of the plaintiff accrued. Thus in *New Orleans v. Gaines*, 15 Wall., 624, on accounting supplementary to a decree in equity the profits for fifteen years with interest were awarded.

‡ *Gardner v. Grannis*, 57 Ga., 539. See on the subject of mesne profits, *Willingham v. Long*, 47 Ga., 540.

In New York the statute did not say when the six years should begin, or when they should end; but in the case of *Budd v. Walker*,* it was held that the six years' limitation was next before and up to the filing of the suggestion for mesne profits.

The judgment in ejectment is not conclusive as to the length of time the defendant has occupied the premises. This is not an issue in the ejectment, hence the plaintiff in the action must prove the length of time and the value of the rents and profits and the damage.

Measure of Damages.—It seems that the rule as to damages in an action of ejectment was very uncertain at common law. Mr. Adams† says: "The jury are not confined in their verdict to the mere *rent* of the premises, although the action is said to be brought to recover the *rents and profits* of the estate, but may give such extra damages as they may think the particular circumstances of the case may demand." This view of Mr. Adams has been adopted in many cases, as cited. This idea is based upon the analogy of this action to actions of assault, libel, or slander, or actions of pure *tort*, in which evidence of aggravation is admitted, and juries sometimes are sustained in giving exemplary damages, or *smart money*. But in the action for mesne profits, the property may have been held in good faith, the allegations of force, etc., are purely fictitious, and the rule should not be tolerated on such facts that the jury should give any damages beyond the actual income. And the general holding of the authorities now is, that the claim is limited to *strict compensation*, and not subject to the absolute discretion of the jury.‡

Damages may be assessed up to the day of trial, upon the

* *Budd v. Walker*, 9 Barb., 493. In the old action for mesne profits in New York the six years' limitation were those next preceding the commencement of the action for mesne profits. *Budd v. Walker*, *supra*.

† *Adams Eject.*, 459. And such was the doctrine in the cases, *Goodtitle v. Tombs*, 3 Wils., 118; 2 Doug., 584; *Dewey v. Osborn*, 4 Cow. (N. Y.), 329; 3 Port. (Ala.), 382. But the later cases as will appear limit the rule to a bare *compensation*.

‡ *Sedgwick on Damages* (7th ed.), vol. i., p. 260; *Hannah v. Phillips*, 1 Grant (Penn.), 253; *Alexander v. Herr*, 11 Penn. St., 537; 82 Penn. St., 107; *Cutter v. Waddington*, 33 Mo., 269-286; *Averett v. Brady*, 20 Ga., 523; *Phillips Ev.*, vol. iv., p. 315; *Bolling v. Lersner*, 26 Gratt. (Va.), 36-58; *Sedw. & Wait, Trial of Titles*, § 665.

principle that interest is recovered on a money demand to that time. The profits are the incident of the cause of action.* The recovery of the nominal damage in the ejectment suit is no bar, as this is simply to authorize a judgment for costs and to establish titles. It has been seen that the rule of damages in New York in the action for mesne profits is fixed as that which prevails in an action of assumpsit for use and occupation, and the compensation is adjusted upon the idea of an implied contract rather than *tort*.†

Interest Allowed.—In the case of *Vandevoort v. Gould*, *supra*, it was held that the *interest* might be allowed; that the inquiry is, what the premises were reasonably worth annually, with the *interest* to the time of the trial.‡

Costs.—The costs of the action of ejectment if not recovered may be proven in the action for mesne profits and included in the judgment in that action.§

It was held in some of the cases that in this action the plaintiff could recover all his necessary expenses, including counsel fees, etc.; such was the holding in New Jersey, in the case of *Denn v. Chubb*.|| But in *White v. Clack* it was held in Tennessee that such “legal and proper costs,” taxed in the action of ejectment, did not include counsel fees.¶

In case of a *ferry*, *saw-mill*, etc., which may sometimes be recovered with the land, the receipts of the ferry, deducting the expenses of fitting up and running it; and in case of the saw-mill, whatever would be the rent between landlord and tenant,

* *Rhodes v. Cruchfield*, 7 Lea (Tenn.), 518; *Whissenhunt v. Jones*, 78 N. C., 361; 36 Wins., 333; 57 Miss., 31; *New Orleans v. Gaines*, 15 Wall., 624; 31 Cal., 487; 63 Ill., 230.

† *Low v. Purdy*, 2 Lans., 422; *Vandevoort v. Gould*, 36 N. Y., 639–647.

‡ *Vandevoort v. Gould*, *supra*; 61 N. Y., 382; *New Orleans v. Gaines*, *supra*; 46 N. Y., 361; 26 Gratt. (Va.), 36; *Jackson v. Wood*, 24 Wend. (N. Y.), 443; 68 Penn. St., 78; 19 Ga., 497; 14 Ohio, 118; 52 Miss., 145; 36 Vt., 210; 33 Mo., 269. As to when interest will *not* be allowed on rents, see *Allen v. Smith*, 63 Mo., 103.

§ *White v. Clack*, 2 Swan (Tenn.), 230.

|| *Denn v. Chubb, Cox* (N. J.), 466.

¶ *White v. Clack*, 2 Swann, 230; *in accord*, *Aslin v. Parkin*, 2 Burr, 665; *Sedw. & Wait*, and cases cited, § 679; *Brooke v. Bridges*, 7 B. Mon. R., 404; *Tyler Eject.*, p. 849.

is mesne profits as between the parties in ejectment.* While ejectment will not lie for a right or privilege which is a mere incorporeal hereditament, yet when ejectment is brought for lands, the rights and privileges appurtenant to the lands may be recovered therewith.†

Damages for Waste and Trespass.—It is well settled that the claim for *damages*,‡ such as cutting down timber and waste generally, may be included in the same action for the “rents and profits,” but must be accounted for and demanded specifically in the complaint or declaration.§ Under this rule, a recovery for mesne profits is a bar to trespass *quare clausum fregit*.||

In Indiana and Wisconsin the courts have held differently, not allowing the claim for *waste* and *damage* to be joined in the action for mesne profits.¶ The plaintiff may bring trespass *quare clausum fregit* against the defendant for an injury done to the freehold intermediate between the verdict and the execution of the writ of possession.**

Income from Improvements.—A very nice question has been presented in the case of the defendant who has occupied the land in good faith, under a color of title, perhaps, and made valuable improvements, by which the rental value of the land would be greatly enhanced, whether he shall be charged with increase of rents and profits of the land resulting from the improvements. The great weight of authority is *opposed* to the allowance of the

* *Morris v. Tinker*, 60 Ga., 466; 20 Ga., 523; *Dunlap v. Yoakum*, 18 Texas, 582.

† *Crocker v. Fothergill*, 2 B. & Ald., 652-661; *Taylor v. Gladwin*, 40 Mich., 232; Sedw. & Wait, § 102.

‡ The plaintiff cannot recover judgment for mesne profits, and then bring another action for *damage* to the inheritance. If, however, the plaintiff in the first action was the owner of a particular estate, i. e., tenant for life or years, he can only recover for injury to the possession; but the owner of the inheritance might sue for the waste and damage to the inheritance.

§ *Emrich v. Ireland*, 55 Miss., 390; 31 Penn. St., 456; 2 Root (Conn.), 224; *Lee v. Bowman*, 55 Mo., 400; 57 Miss., 73; *Lippett v. Kelley*, 46 Vt., 516; *Whitledge v. Wait*, Sneed (Ky.), 335.

|| *Cunningham v. Morris*, 19 Ga., 583; 8 Wend. (N. Y.), 587; 91 Penn. St., 504.

¶ *Bottomoff v. Wise*, 53 Ind., 32; 27 Ind., 4-8; *Pacquette v. Pickness*, 19 Wis., 219.

** Sedw. & Wait, § 669; 4 Cow. (N. Y.), 329; 9 Port. (Ala.), 349.

increased rents resulting from the improvements thus made.* In Mississippi it was held that under the statute the plaintiff was entitled to the increased rent.†

Rules as to Ore and Mines.—Say Sedw. & Wait: “In *Edge v. Kille*,‡ it appeared that the defendants were *bona fide* occupants under color of title, and had expended large sums of money in developing the mines upon the property, and making permanent improvements of great value. It was held that they should be charged only with the value in place of the ore removed.§ The court said, that ‘ore leave, or the right to dig and take ore, can have no general market value.’ The value of ore in place is to be ascertained by deducting the costs of mining, cleansing, and delivering the ore in market from its market value when delivered, the difference being its value in place.”||

Mesne Profits in Equity.—When the court of equity renders a decree declaring the possessor of the land a trustee, or the widow who has dower assigned after being kept out for a time, or a decree of restoration of the possession of lands, the possession of which had been obtained by fraud, and in other instances, the court having the parties before them and to do complete justice, will order an account for rents and profits.¶

Abatement.—At common law all personal actions died with the person, especially actions founded in *tort*. The action for mesne profits in the absence of statutory regulations being in the nature of a *tort*, dies with the party and the suit abates.

But as has been stated, perhaps almost all the States provide

* *Nixon v. Porter*, 38 Miss., 401; 19 Ind., 392; 3 Bland (Md.), 551-591; 4 Litt. (Ky.), 347-371; 4 Cow. (N. Y.), *supra*, 168; 30 Wis., 308; 56 Miss., 352; 49 Iowa, 456; 44 Tex., 570. It was said in Kentucky if the *bona fide* occupant should be allowed prime costs for his improvements, then he should pay the increased income from the time of making them. *Bell v. Bornett*, 2 J. J. Marsh (Ky.), 517.

† *Miller v. Ingram*, 56 Miss., 510. ‡ *Edge v. Kille*, 84 Penn. St., 333.

§ *Hardie v. Young*, 53 Penn. St., 176; 41 Penn. St., 291.

|| *Clower v. Joplin Mining Co.*, 4 Dillon's C. C., 469 (note); *Coleman's Appeal*, 62 Penn. St., 278; *Barton Coal Co. v. Cox*, 39 Md., 1; Sedw. & Wait, § 677.

¶ *Green v. Biddle*, 8 Wheat., 1; *Maddock's Chancery*, vol. i., p. 73; 9 Florida, 340; *Bains v. Perry*, 1 Lea (Tenn.), 37; *Hill v. Cooper*, 8 Oregon, 254; *Clark v. Tompkins*, 1 S. C. (N. S.), 119; 1 A. K. Marsh (Ky.), 1. See the famous case of *New Orleans v. Gaines*, on this point, 15 Wall., 624.

now that an action of ejectment shall not abate on the death of the plaintiff or defendant.

Under the fictitious ejectment the action did not abate by the death of the lessor, but it was usual to make the heirs party plaintiff in order to hold them liable for costs. In *Molton v. Munford's Administrators*,* an act of this kind was construed by the courts of North Carolina in 1825. Two questions arose for the first time in the State in that case: First. Where a suit can be revived against a personal representative, can the suit be brought originally? Second. Where the defendant dies, pending ejectment, and the heirs are made party defendants and judgment had against them, is the judgment conclusive against the administrator of the first defendant, who had been sued for the mesne profits accrued before the death of the original defendant? The court held, first, that the administrator could be sued in the original action for mesne profits and damage which accrued in the lifetime of the defendant. That such was the proper construction of the act, allowing a revivor in actions founded in tort, and that under this act the administrator could be sued originally for the conversion of personal property by the intestate.

The court held, secondly, that the judgment against the heirs was conclusive on the administrator in the action for mesne profits against him. The heirs of Munford being permitted to defend through their guardian, were held liable for the mesne profits only for the time the guardian received the same, as they could not be chargeable with the *tort* of the ancestor. So the plaintiff recovered the mesne profits from the administrator of the original defendant up to the death, then in another action the plaintiff recovered the mesne profits against the heirs, although minors, the guardian having actually been in possession and received the profits.†

In *King v. Little*‡ the court of North Carolina held, that where husband and wife bring ejectment for the wife's land, and on the husband's death pending the suit, the action survives to the wife, and that on the death of the wife the action for mesne profits survives to her, and the same may be recovered by her

* *Molton v. Munford's Admr.*, 3 Hawks (N. C.), 490.

† *Molton v. Munford's Heirs*, 3 Hawks (N. C.), 383.

‡ *King v. Little*, 77 N. C., 138.

executor to the time of her death ; but that the rents and profits accrued after her death went to the heir and devisee, who must sue for the same. It was said in this case by Judge Bynum, without citing authority, that the statute of limitations did not apply to the action for mesne profits. Whether that is the construction of the limitation acts of that State, *query* ?

CHAPTER IV.

IMPROVEMENTS.

UNDER the strict rules of the common law the occupant of land could not charge the rightful owner with the labor and expenses for improvements.

And this is upon the theory that the *owner* of the land was under no equitable or moral obligation to pay for improvements made without his authority and which was the *tort* of the wrongful occupant, the effect being to make a man a debtor against his will. Thus it was said, in the case of *Townsend v. Shipp's Heirs*:* "If owners could not have the exclusive use and control of real estate, it would be in the power of others, by taking possession without permission and making larger improvements, to acquire a property in the soil. It would be manifestly repugnant to the first principles of property, of society, and of free government, that any person should pay for work and labor done without his consent." Again, it is said by an elementary writer, having reference to the rules of the common law: "In regard to improvements made on land while out of the possession of the rightful owner, the general principle of the English law, as well as our own, is that the owner recovers his land in ejectment, without being subject to the condition of paying for improvements which

* *Townsend v. Shipp's Heirs*, Cooke (Tenn.), 293 ; see, also, *Frear v. Hardenburgh*, 5 Johns. (N. Y.), 271 ; *Billings v. Hall*, 7 Cal., 1, and the authorities cited ; 31 Wis., 495 ; *Ford v. Holton*, 5 Cal., 319.

may have been made upon it by any intruder, or occupant without title. The improvements are considered as annexed to the freehold, and pass with the recovery. Every possessor makes such improvements at his peril, and whether acting on an honest belief in his title, or without color of right, the party who is ousted loses all benefit of his expenditures."* Another writer repeats, in general terms, the same view of the common law: "The improvements may be valuable, but they may be quite unsuited to the use which the plaintiff intends to make of his land. Even if they are such as he would have wished to make, they may also be such as he could not have afforded to make. To compel him to pay for them, or to allow for them in damages, which is all the same, is quite as unjust as it would be to lay out money in any other investment for a man, and then compel him to adopt *nolens volens*."†

These extracts and references are given more to show what the law *has* been, than what it is *now*; for by the aid of legislative enactments, and the disposition of the courts to adopt the law to the situation of American land titles, the law is very different from that announced above.

Indeed, these writings and opinions give nothing more than an iteration of certain propositions of the common law in its earlier history, some of which, when applied to the condition of our system of laws, and when the question of "good faith" and "color of title" are considered, are without reason, and when the reason of the law ceases the law does not longer exist. That the owner of the land is entitled to the possession, and that he is entitled to the rents and profits while occupied by the wrongful possessor, are propositions not open to controversy. These rights are secured and asserted at the same time when he is charged with improvements. Now, take the case of a mere *wilful intruder* and trespasser, having no *honest* claim of title. The strict rule of the law, as given above, should apply, and that, too, with reason; but when it is considered that in this vast undeveloped country, stretching over such vast distances and space that a man may have a written assurance of title, under which he takes possession and makes improvements,

* Sedgwick on Damages, 7th ed., vol. i., p. 246.

† Wood's Mayne on Damages, p. 554.

in the *honest* belief of his title, the same reasons for the rule of law do not apply. But the question has given the courts some trouble. Perhaps the case of *Jackson v. Loomis** was the first case in the United States where the improvements were allowed as a set-off to an action for mesne profits. This case was decided in 1825, and C. J. Savage said in the opinion, that no case in point, either in England or the State of New York, was produced.

The *dicta* of Chancellor Kent, in *Murray v. Gouverneur*,† was referred to by the court, and it was said that the doctrine was recognized by the Supreme Court of the United States, in the great case of *Green v. Biddle*,‡ but the question was not directly involved in that case, as will appear hereafter.

The case of *Green v. Biddle* was decided only two years before the case of *Jackson v. Loomis* (namely, 1823), and the great question in that case was the constitutionality of the *Improvement Act* of Kentucky, giving to the occupants pay for improvements, and fixing a board of commissioners to settle the value of the same, etc.; the act was held invalid and void, as against the *owners* of lands whose rights were secured as Virginians by the compact between the States of Virginia and Kentucky, in 1798. This act was held to impair the rights of the owners in those lands whose titles had their inception in Virginia while the soil of Kentucky belonged to Virginia, where the common law prevailed, and whose rights were expressly provided for in the *compact* under the sanction of the United States government. The act had other discriminating and unusual and extraordinary provisions. The opinion comprises about one hundred pages of Wheaton, and is full of learning. Henry Clay was one of the counsel.

But the question was fairly made in *Jackson v. Loomis*, and decided in favor of the view that the *bona fide* occupant should have pay for improvements, at least to the extent of the mesne profits claimed by the plaintiff in ejectment.

The Rule of the Civil Law and in Equity.—The *civil law* made a distinction between the possessor *bonæ fidei* and *malæ fidei*. The latter was not allowed to recover for improvements, but the

* *Jackson v. Loomis*, 4 Cow. (N. Y.), 168.

† *Murray v. Gouverneur*, 2 John. Cas., 441.

‡ *Green v. Biddle*, 8 Wheaton, 1.

former was permitted to mitigate the damages in an action brought by the rightful owner by offsetting the value of permanent and useful improvements made on the land in good faith to the extent of the rents and profits claimed.*

Reconvention, or *reconventio*, as used in Louisiana and Texas, is a cross-demand in the nature of a bill in equity.† The courts of equity have allowed these improvements upon purely equitable principles; and it is through this equitable theory that the rules and maxims of the civil law have been so generally applied to the modern procedure regulating mesne profits and improvements.‡

But the law requires that certain facts should appear either for the jury or the chancellor.

Bona fide Occupant under Claim of Title.—The claim for betterments is founded upon equitable grounds, and it would be manifestly against equity and a dangerous policy to make allowance for improvements made by a party with full knowledge of the true owner's claim, or of an adverse claim.§

The question of good faith is for the jury; and a charge by the court, which took from the jury the question of good faith, with directions to allow the same notwithstanding, was held wrong.||

What is a bona fide Occupant.—Some of the State statutes prescribe in terms what is necessary to entitle the party to these improvements. For instance, in Tennessee, the code allows as a set-off to mesne profits, or rather by bill in equity, all "permanent and valuable improvements made in good faith under color

* Sedw. & Wait, § 691; Waterman on Recoupment and Set-off, p. 555; Burrows v. Pierce, 6 La. Ann., 297.

† Waterman on Recoupment and Set-off, p. 630; Sedw. Damages, vol. i., pp. 247-257; 12 Vesey, 84; Bright v. Boyd, 1 Story, 479; Bell's Com. on Law of Scotland, § 538; Coulter's Case, 5 Coke.

‡ Kames Equity, p. 421; Woodhull v. Rosenthal, 61 N.Y., 382; McKinley v. Holliday, 10 Yerg. (Tenn.), 477; Davis v. Louk, 30 Wis., 308; 83 N.Y., 575; 55 Penna. Stat., 407; Yount v. Howell, 14 Cal., 465; 24 Ark., 109.

§ Sedw. & Wait, § 694; 61 N.Y., 382; 83 N.Y., 575; 16 Wis., 91; 31 Penna. Stat., 456; 56 Miss., 352; 20 N.H., 492; 36 Tex., 286; 42 Mich., 513; 100 Mass., 177; Bristol v. Evans, 2 Over. (Tenn.), 341; 59 N.Y.; 46 Cooke (Tenn.), 293; Potts v. Cullum, 68 Ill., 217, in which latter case it is held in Illinois the right to set-off the improvements is not affected by the fact that the plaintiff may be an infant or a *feme covert*.

|| Powell v. Davis, 19 Texas, 380.

of title."* Statutes of similar import are not difficult to enforce and construe.

On this point I shall be content to quote what is said by another,† with a portion of the references. A *bona fide* possessor of land is one who not only honestly supposes himself to be vested with the true title, but is ignorant that the title is contested by any other person claiming superior to it.‡ An occupant of land under color of title is presumed to be acting in good faith until the contrary appears. The court will not presume that the possessor is a trespasser or wrong-doer.§ Says Kent: "Possession is always presumption of right, and it stands good until other and stronger evidence destroys that presumption."||

Knowledge of the adverse title is fatal to the claim for improvements. So it is manifest that a party who obtains a title by fraud, or wrongfully retains a title which he knows ought to be in another, or the trustee wrongfully retaining possession in opposition to the *express* trust, is not entitled to compensation for improvements made.¶

Exceptions to the General Rule.—In a few of the cases the question, as to what is *sufficient* notice of the adverse title, has caused a divergence in the judicial opinions to a limited extent. Thus by the court of Texas it was suggested that notice of the adverse claim would not necessarily destroy the good faith of the possessor if his confidence in his title was unshaken.** Thus in *Hill v. Spear*†† it was held that the fact that the defendant purchased land knowing his vendor held under a deed from a married woman defectively acknowledged, was not inconsistent with his good faith in making the purchase, and the compensation for the improvements were allowed.

* Tenn. Code, §§ 3259, 3261; *Avant v. Hord*, 3 Head, 459; 10 Yerg., 59.

† Sedw. & Wait, *Trial of Title to Land*, § 694.

‡ *Green v. Biddle*, 8 Wheat., 1; *Cole v. Johnson*, 53 Miss., 94; 31 Penna. Stat., 456; 31 Vt., 300; 6 Paige, Ch. N. Y., 390; *Henderson v. McPike*, 35 Mo., 255; 24 Texas, 366.

§ *Stark v. Starr*, 1 Sawyer, 15.

|| *Smith v. Lorillard*, 10 Johns. (N. Y.), 356.

¶ 61 N. Y., 382; 6 Watts (Penn.), 87; *Moseley v. Miller*, 13 Bush (Ky.), 408; *Thompson v. Thompson*, 16 Wis., 91; 56 Miss., 352; *Barrett v. Cocke*, 11 Heisk. (Tenn.), 566.

** *Sartain v. Hamilton*, 12 Tex., 222; 24 Tex., 366; 46 Tex., 408.

†† *Hill v. Spear*, 48 Tex., 583. See chapter, *infra*, "Notice."

This holding of the Texas court has been criticised on the idea that they constitute a dangerous innovation upon settled law.* But it seems that, while a party in possession should be held to "good faith," there might be cases in which he had knowledge of an *adverse claim*, and yet be protected in his improvements in case of loss. The party may know of an *adverse claimant*, and at the same time he has reasons, facts, and circumstances to impress him with the belief that this claim is founded in *fraud*, and therefore, *he* has the true title.

It might turn out, however, that through loss of testimony, error of the court, or other cause, that the *fraud* was not established, should the party in possession under color of title, acting in good faith, believing, and being fully advised that he has a good title, be disallowed improvements because he "lost the suit?" It is not always that the real title is successful, any more than that *right* always triumphs over wrong. We know the contrary to be true in numberless instances. Suppose the question depends upon a question of fraud, depending upon the testimony of a large number of witnesses, the case so nearly balanced that a jury could find either way without an imputation of great error, must the occupant, who thus loses the *title*, which he *believed* he had, lose also all labor and expenses for valuable improvements which go to the successful claimant? It might be that the occupant should be fixed with notice such as is calculated to put a man of ordinary prudence on the alert. This is the rule under the doctrine of estoppel *in pais*, and would seem to be a safe rule here.†

Constructive Notice not Sufficient.—The *constructive* notice which the law fixes upon a purchaser or creditor by the notice of registration, is not sufficient to preclude the occupant from recovering improvements or betterments, if he purchase in good faith, and in the honest belief that he had obtained a perfect title. The mere fact of a defect found in the record is not sufficient.‡

This claim of the occupant, as a general rule (and such is the effect of most of the statutes), should be under a "color of title."

* Sedwick & Wait, Trial of Title to Lands, § 695.

† See chap. Estoppel In Pais, Notice, Bona Fide Purchaser.

‡ Whitney v. Richardson, 31 Vt., 300; 9 Wis., 552; 6 Oregon, 31; 53 Miss., 94; 43 Miss., 687; 55 Mo., 400; 31 Penna. St., 456.

Where the occupant had a good estate for life he was not defeated of his improvements if he had reason to believe that he had a title in fee.*

It will not be forgotten that, as a general rule, the occupant is not entitled to compensation for betterments in excess of the mesne profits,† though the statutes of some of the States do provide for full compensation; and in some of the States compensation is made without any claim for mesne profits.‡

What Constitutes an Improvement.—The improvement must be something that the occupant cannot carry away, and will make the land more valuable. This is the test, does the melioration make the land more valuable to the owner?§

“By the term ‘value,’ as applied to improvements, is meant the value to the real owner.”||

The improvements must be upon the land: so the making of a sidewalk outside of the premises will not entitle the occupant to set-off.¶ Neither are ornamental improvements, as a general rule, allowed.** In *Whitledge v. Wait*,†† it is said that it is not always an easy task to determine the question as to what constitutes useful and permanent as distinguished from ornamental meliorations. Thus, expenditures upon property suitable for a country residence might be allowed, which would be manifestly out of place upon lands used for agricultural purposes. The adaptability of the improvements is the test.

Improvements perishable in their nature cannot be allowed.

* *Plimpton v. Plimpton*, 12 Cush., Mass., 458; 100 Mass., 177; see *Bedell v. Shaw*, 59 N. Y., 46, where it is held that to be *adverse* the possession must be under color of title; see *Limitations*, head “Color of Title,” *infra*.

† See the recent case in New York of *Wood v. Wood*, 83 N. Y., 575, where this rule is adopted; 14 Cal., 465; 10 Yerg. (Tenn.), 477; 61 N. Y., 382; 30 Wis., 308; *Jackson v. Loomis*, 4 Cow. (N. Y.), 168; *Merritt v. Scott*, 81 N. C., 335; *Dowd v. Faucett*, 4 Dev. N. C. Law, 92; *Scott v. Mather*, 14 Tex., 235; *Tyler on Eject.*, 849.

‡ 5 Cal., 319; 43 Miss., 687; 24 Tex., 366; 14 Tex., 235; 19 Tex., 194.

§ *Sedw. & Wait*, § 699; *Johnson v. Gresham*, 5 Dana (Ky.), 547; *Woodhull v. Rosenthal*, 61 N. Y., 382; 84 Penn. St., 334.

|| *Sedw. & Wait*, § 699; *Bristoe v. Evans*, 2 Over. (Tenn.), 341; 30 Tex., 296.

¶ *Curtis v. Gray*, 15 Gray (Mass.), 36; 52 Cal., 385.

** 53 Miss., 103; 10 Pick. (Mass.), 398; 14 Gray (Mass.), 132.

†† *Sneed (Ky.)*, 335.

Not after Suit Brought.—The occupant certainly has notice of the adverse claim as soon as the suit is brought and the pleadings are filed, and the reasons for the rule allowing a set-off for these improvements against the claim for mesne profits will not allow compensation for expenditures after suit brought.*

Improvements made by Grantor.—If a party purchase in good faith from a party, believing that he acquired a good title, he cannot have the advantage of improvements made by his grantor who *was not an occupant* in good faith, although the last purchaser may have paid the full value of the improvements.†

The grantee could acquire no right of action which his grantor did not possess. But suppose the *bona fide* grantee of a previous *bona fide* possessor who has made improvements, then it is just that he should have the benefit of such improvements, so far as they are in excess of the rents due from the first possessor. The plaintiff gets the improvements by his judgment, and as the defendant succeeds under the deed to all the rights of his grantor or warrantor, he should be allowed to set up whatever defence his warrantor could have interposed.‡ It is true that the defendant (the last grantee) is not liable for rents and profits taken prior to his own possession and entry if he takes no claim for improvements. But if he takes credit for prior improvements, all profits chargeable to former occupants must first be deducted.§

Basis of Valuation.—"The value of betterments at time of, is the correct basis of the award."||

Pleading.—The claim for betterments is usually asserted as an offset in the action for mesne profits, whether the latter action be joined with the suit for title or separately.

And the defendant must plead them as such in his answer, and must show that he entered the disputed land under claim of title,

* Taylor v. Whiting, 9 Dana (Ky.), 399; Haslett v. Crain, 85 Ill., 129; 31 Penn. St., 456; 61 N. Y., 332; 23 Penn. St., 117; Osborn v. Storms, 65 Ind., 321; Haslett v. Crain, 85 Ill., 129; see Johnson v. Fritch, 57 Miss., 73.

† Winslow v. Newell, 19 Vt., 164.

‡ Willingham v. Long, 47 Ga., 540; Morrison v. Robinson, 31 Penn. St., 456.

§ Sedw. & Wait, § 706.

|| Wendell v. Moulton, 26 N. H., 41. It is held in Georgia that the defendant is entitled to the value which the betterments give to the land, and he is not limited to the actual cost of the same. 47 Ga., 540; 39 Ga., 328; see 45 Miss., 542; 9 Bush. (Ky.), 718.

and that the improvements were made in good faith while holding adversely to the plaintiff, and that they are permanent and valuable improvements.*

It is not sufficient to claim improvements and allege their cost, it must be shown that improvements are still of value and better the condition of the property.

In some of the States the claim for betterments will not be entertained in the action of ejectment unless the plaintiff has made a demand for mesne profits.†

Ordinarily the defendant cannot have the value of improvements ascertained until the determination of the question of the title.‡ In the States where the defendant is entitled to recover the excess of improvements over the rents, it is not proper to enter two judgments. One judgment in which the plaintiff is awarded the possession of the land, and the defendant to have the value of the improvements; the possession being conditioned upon paying the value within the statutory period.§

In Virginia, the claims for mesne profits and improvements must all be passed upon by the same jury.||

It has been stated that, by the statute of some of the States, the defendant is entitled to relief for the excess of the improvements. Thus, the law of North Carolina¶ provides a separate proceeding for this special purpose; the following is a part of the Act of 1871-72:

"Any defendant against whom a judgment shall be rendered for land, may, at any time before the execution of such judgment, present a petition to the court rendering the same, stating that he or those under whom he claims, while holding the premises under a title believed by him or them to be good, have made permanent

* *Moss v. Shear*, 25 Cal., 38; *Bonner v. Wiggins*, 52 Tex., 125; 36 Tex., 236; 19 Tex., 380; 35 Cal., 346.

† *Learned v. Corley*, 43 Miss., 687; *Daniels v. Bates*, 2 G. Gr. (Iowa), 151; *Ford v. Holton*, 5 Cal., 319.

‡ *Wernke v. Hazen*, 32 Ind., 431.

§ *Scott v. Reese*, 38 Wis., 638; *Russell v. DeFrance*, 39 Mo., 506.

¶ *Goodwin v. Myers*, 16 Gratt., 336. See also *Malone v. Stretch*, 69 Mo., 25; 6 Iowa, 401; 14 Iowa, 136; 39 Penn. St., 415; *Sherry v. State Bank*, 6 Ind., 397.

|| *Battle's Revisal*, ch. xvii., sec. 262, Act 1871-72. This act is construed by C. J. Smith, in *Merrett v. Scott*, 81 N. C., 385.

improvements thereon, and praying that he may be allowed for the same over and above the value of the use and occupation of such land; and thereupon the court may, if satisfied of the probable truth of the allegation, suspend the execution of such judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for such improvements."

In the *trial* for title where the plaintiff claims rents and profits, the defendant can set-off valuable improvements in this State to the *amount* of the rents and profits, but if the value of the improvements is in excess of the mesne profits, the defendant must follow the statute.* This act provides, also, that such balance, so found due the defendant, shall constitute a lien upon the land.† This is carrying the rights of the occupant to quite a liberal extent.

Titles which will not Support the Claim for Improvement.—The remainderman is not chargeable with the improvements of the life-tenant during his occupancy.

The life-tenant is supposed to make the improvements for his own benefit.‡ In Tennessee it is held, where a vendee of land under a parol agreement, who has failed to comply with his contract, and abandoned the possession without the fault of the vendor, cannot recover for the improvements put by him upon the land.§

In Texas a tax-title does not contain a suggestion of possession and improvements in good faith.||

In Pennsylvania it was held that the party entering under a contract void by the statute of frauds, and who made improvements with the knowledge of the owner, gave no equity to the purchaser to retain possession until repaid.¶

In North Carolina it has been repeatedly held that the vendee

* *Merritt v. Scott*, *supra*, citing *Dowd v. Faucett*, 4 Dev. Law, 92.

† Sec. 262, q.

‡ *Merritt v. Scott*, 81 N. C., 385.

§ *Rainer v. Huddleston*, 4 Heisk., 223. *In accord*, *Spalding v. Chelmsford*, 117 Mass., 393.

|| *Robson v. Osborn*, 13 Tex., 298; (31 Wis., 495). See also *Miller v. Brownson*, 50 Tex., 583.

¶ *Harden v. Hays*, 9 Penn. St., 151. A contract to pay for improvements is not within the statute of frauds, as being the sale of an interest in lands. *Norris v. Hoyt*, 18 Cal., 217; 26 Tex., 612; *Lower v. Winters*, 7 Cow. (N. Y.), 263; 4 Kent's Com., p. 450.

under a *verbal* contract to purchase land enters and makes valuable improvements, when the *vendor* refuses to comply with the contract, he is entitled to compensation for improvements.*

Payment of Incumbrances.—Says a writer: "The question of the right of a *bona fide* possessor of real estate, who has paid out money in discharging valid existing incumbrances, or charges upon the estate, having no notice of any infirmity in his title, has been before the courts in different forms, and it may be regarded as a settled rule in equity, that he is entitled to be repaid the amount of such payments by the true owner seeking to recover the estate from him."†

Improvements by Husband on Wife's Land.—On the death of the wife without issue, the husband was held to have no claim against his wife's heirs for the improvements made upon her land by her consent.‡

Mortgagee in Possession.—The mortgagee in possession is not allowed pay for general improvements made without the acquiescence of the mortgagor. It is readily seen that this right to improvements might put it in the power of the mortgagee to cripple the power of redemption.§

Co-tenants.—The court of equity will usually adjust the equities and not allow one tenant in common to get the benefit of improvements made by his co-tenant, under the honest belief that he held the whole title.

The doctrine of contribution among tenants in common, where there is no adverse holding, presents quite another subject, which cannot now be noticed.

Defective Title.—As a general rule, if the vendee is not content with the title offered, he should specify the objection and surrender up the possession of the land.||

* *Albee v. Griffin*, 2 D. & B. Eq., 9; *Winston v. Fort*, 5 Jones Eq., 251; 71 N. C., 507.

† *Sedw. & Wait* (Trial of Title to Land), § 704; *Willie v. Brooks*, 45 Miss., 542; *Bright v. Boyd*, 1 Story, 498; *Cook v. Toombs*, 36 Miss., 685.

‡ *Marable v. Jordon*, 5 Hump. (Tenn.), 417; 117 Mass., 360; *Wood v. Wood*, 83 N. Y., 575; *Minier v. Minier*, 4 Lans. (N. Y.), 424.

See chapters "Separate Estate," "Dower," *infra*.

§ *Moore v. Cable*, 1 Johns Ch. (N. Y.), 385; 17 N. Y., 80-91; 2 Pick. (Mass.), 506; 14 Gray (Mass.), 132; *Sedw. & Wait*, § 710.

|| 20 N. Y., 184; 14 Penn. St., 331; 26 Wis., 588; *Hill v. Wim.*, 60 Ga., 337.

But this rule works hard on the vendee who has paid part of the purchase-money, or made valuable improvements, and then discovers that the vendor cannot make the title for which he contracted; the courts have, therefore, held that, where a vendee was in possession, under a contract from the vendor to convey, and had made improvements in conformity with the provisions of the contract, he has an equitable lien upon the premises for the money so expended for improvements, which entitled him to hold possession, and the payment was a condition precedent to the recovery of the premises, by the vendor, in ejectment.*

CHAPTER V.

FIRST LINK IN THE CHAIN OF TITLE.

THE great paramount question which is presented in most controversies respecting real property is who has the *title*? *Title* or *right* is the desirable result, whether the inquiry be under the strict and rigid forms of a court of *law*, or the more elastic and liberal rules which prevail in a court of equity.

When the suit is a contest as to who has the better legal title, untrammelled by any questions which arise in courts of equity, the plaintiff must show what is familiarly called a *chain of title*. The first *link* in this *chain* is the beginning of the title. This *beginning* is most usually a grant or patent from the state, government, king, or other power in whom all title to land is supposed to exist. For instance, says Judge Kent: "It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor or lord paramount of all the lands in the kingdom, and the true and only source of title." He further says: "In this country we have adopted the same principle, and applied it to our republican government; and it is a settled and fundamental doctrine

* Sedw. & Wait, § 323; Gibert v. Peteler, 38 N. Y., 165.

with us that all valid individual title to land within the United States is derived from the grant of our local governments, or from that of the United States, or from the crown, or royal chartered governments established here prior to the Revolution."

What the Plaintiff must Show.—The party sued being generally the person in possession, his title and possession are presumed to be consistent, and both rightful and lawful, until the contrary is shown by a preponderance of evidence on the part of the plaintiff who seeks to disturb the same.*

It is said that the plaintiff must not only show a better title than the defendant, but a better title than all the world. As a consequence of this rule the defendant, in the absence of any cause of estoppel, may show what is called an outstanding title, and thereby defeat the plaintiff in the action. This practice prevents a multiplicity of lawsuits. If the court should, on seeing that plaintiff's title is superior to the defendant's, turn him out, after it appearing that the real owner was not before the court, it is obvious that another suit would follow on behalf of the real owner or his assignee. The party in possession, therefore, is allowed to retain that possession, although not the real owner, against all the world except the *true owner*. The defendant may, in many instances, be estopped from a denial of the plaintiff's title, whether it be a valid title or not. This, too, for reasons which will commend themselves to the judgment; the chief reason of which is, a man shall not be allowed to take advantage of his own wrong.

The Source of Land Titles in the United States.—It may not be uninteresting to the student and practitioner to take a cursory glance at the origin of land titles in the United States and the several States.

* And even in a case where the State government or people may be the claimant title must be shown.

In the case of *The People v. The Rector of Trinity Church*, 30 Barb., 537, it was insisted for the plaintiff that there was a presumption of law that all lands belonged to the people, and that the defendant must show title; but the court refused to sustain this view, holding that the people must show title or a vacant possession within forty years. And upon the simple principle that the possession of the occupant is *prima facie* evidence of title, and the burden is on the claimant to show title and right of entry before this possession can be disturbed.

The king of England, being by fiction of law the original proprietor and owner of all the land in the kingdom, subject, however, to certain feudal principles, the American colonies, therefore, being political corporations, obtained title to the soil through the royal charter of the king.

For instance, the "New England, in America," was a grant by King James, in 1620, to forty corporators, consisting of noblemen and gentlemen of distinction, having the power to choose their own successors from time to time. The grant was for that portion of the continent between the fortieth and forty-eighth degrees of north latitude, and "in length by all the breadth aforesaid throughout the main land from sea to sea, provided the same or any part be not actually possessed or inhabited by any other Christian prince or state."*

Subsequently this company issued grants to the soil of Massachusetts and Maine.

So the colonists of Pennsylvania, Virginia, Maryland, New York, Carolina, and Georgia had charters for the soil. These several charters are condensed and stated in Story's *Commentaries on the Constitution of the United States*.†

These lands thus granted to the colonial individuals and corporations passed the absolute title, unaffected by the feudal restraints which prevailed for so long a time in England. These grants were not like the allotments made by William the Conqueror to his favorite military followers, who again disposed of the same in the shape of *feuds*, by the terms of which the tenant or vassal had no very certain right in the soil, and was bound to certain service of fealty and homage to the chief lord of the soil. This holding land according to the feudal tenure has never prevailed in the United States, and was abolished in England by the statute of 12 Charles II., except a few fictions founded upon this system. The tenure prescribed in these colonial charters was free and common socage, being "according to the free tenure of lands in East Greenwich, in the county of Kent, in England, and not *in capite*, or by knight's service." (See New England patent, 1620.)

Of course when these colonies became States they succeeded to

* See Hazard's State Papers, vol. i., 103.

† Story on the Constitution, vol. i., pp. 1 to 98.

all the rights of the soil which had not passed to individuals during their colonial existence; and each State has a mode by which individuals can become the owners of land, the evidence of title in the individual being a grant or patent from the State, generally signed by the governor, and countersigned by the secretary of state, with the great seal of the State affixed, or by such other officer as may be authorized to issue grants.

The Revised Constitution of New York, of 1846, declares that the people, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State, and all lands, the title of which fails from a defect of heirs, reverts or escheats to the people.*

The grant of the State conveys the legal title, but leaves all equities open, and courts of equity can go behind the patent to examine the equity of the patent.†

Courts of law will not go behind the grant to discover irregularities.‡

In the case of a patent from the United States they are presumed valid as to all the world. But this doctrine does not apply to the lands of those persons who obtained title from Mexico, which were protected by the treaty of peace with that government. Congress provided a mode of ascertaining these lands, and issuing a patent; but it was only in the nature of a quit-claim; the title never was in the government of the United States.§

As a general rule, the *oldest* grant conveys the legal title.

The exception is where grants are founded upon a *legal* entry. Then, if the entry is made according to the strict requirements of the statute, the grant *relates* to the entry.

So in Tennessee it has been long established that the elder entry (legal) and younger grant is the superior title to the older grant and younger entry.|| But the elder *survey* does not have this effect. The only initiatory act of appropriation ever recognized in North Carolina or Tennessee is the *entry* made strictly

* Art. I., § 2.

† *Brush v. Ware*, 15 Peters U. S., 93.

‡ *Parker v. Claiborne*, 2 Swan, 565.

§ *Adams v. Norris*, 103 U. S., 591.

|| *Thomas v. Tankersly*, 5 Cold. (Tenn.), 165; *Donegan v. Taylor*, 6 Hump., 500; *Anderson v. Cannon*, 1 Cooke's B.

according to law.* It is said that a different rule prevailed in Virginia, owing to her own peculiar land system.

But there is a wide difference in the holding of the courts in Tennessee and North Carolina on the effect of the *entry*. In the first State, as appears from cases cited, the entry is recognized in a *court of law*, and the elder *legal entry* prevails although the grant be a *junior grant*; but in North Carolina the *oldest grant* prevails in ejectment.

The entry is not considered a *legal title*—is not given in evidence in ejectment. But the junior grantee can go into equity and show a *special entry*, and charge notice on the senior grantee of this equity, and have the holder of the senior grant declared a trustee for the elder enterer.†

The entry is a mere *equity*, and if a party with knowledge of this equity takes out a grant he may be declared a trustee. As to what is such entry in Tennessee as to become a *legal entry*, see authorities cited.‡

And in North Carolina the decisions quoted indicate what kind of entry becomes notice.

The Presumption in Favor of Grants.—The objection to the grant on the grounds of a want of power in the officer issuing it, is met by the following rule, as stated by the Supreme Court of the United States in the case of the United States v. Peralta et al., 19 Howard, 343. The court say: "We have frequently decided that the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurped, but that a legitimate authority had been previously given or subsequently ratified." The adoption of a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it.

The purchaser from the grantee is not bound to go behind the grant to discover an equity in a third party to find out irregular-

* Donegan v. Taylor, *supra*.

† Featherston v. Mills, 4 Dev. Law., 596; O'Kelly v. Clayton, 2 Dev. & B. Law, 246; Crow v. Holland, 4 Dev. Law, 417.

‡ King's Tenn. Digest, vol. ii. (Land Law); Ibid. (Chancery). If the elder entry is not *special* the *junior* entry is the better.

ities. He is protected by the presumption that public officers do their duty.*

Notwithstanding this reasonable rule, where a public officer is authorized to exercise a power on certain *conditions* and under certain *restrictions*, these conditions and restrictions must be considered a part of the power.

And the party relying on the act (or grant, for instance) must show affirmatively that the conditions upon which the power is based have been complied with.†

This case arose as to the validity of a grant by a Mexican governor of California, while California was a part of Mexico, to a large body of land on Sacramento River.

The regulations for the colonization of the Territories of the government of Mexico, made 21st November, 1828, in pursuance of the Act of the General Congress, August 18th, 1824, provided :

1st. That the governors of the Territories should be empowered to grant vacant lands, among others, to private persons who may ask for them, for the purpose of cultivating and inhabiting the same.

2d. That every person soliciting lands shall address the governor a petition, expressing his name, county, religion, and describing the same.

3d. And be recorded in a book kept for that purpose.

On the argument of this case for the United States, the Attorney-General, Jeremiah S. Black, made the following objections to the grant :

1st. The grant is inoperative, for want of evidence that it was delivered while the governor had power to make it.

2d. The grant is fraudulent, fictitious, and simulated.

3d. Assuming the paper on which the claim is based to be genuine, it is nevertheless void and worthless, for want of a *petition* and inquiry.

All the propositions were sustained and the grant held invalid; the court held the third objection sufficient, and said that the circumstances under which it was issued subjected it to the charge

* *Lea v. Polk County Copper Co.*, 21 How. U. S., 120; *Bagdell v. Broderick*, 13 Peters, 448.

† *United States v. Cambuston*, 20 How., 59.

of fraud. And the court used the following language: "Authority to make the grants is there expressly conferred on the governors, as well as the *terms* and *conditions* prescribed upon which they shall be made. The court must look to these laws for both the power to make the grant, and for the mode and manner of its exercise, and they are to be substantially complied with."

The same principle was decided in the case of the United States *v.* Percheman, 7 Peters, 51. By the cession of Florida to the United States in the treaty with Spain, 22d February, 1819, about thirty millions of acres of land were acquired by the United States; about three millions of this quantity had previously been granted to individuals.

These lands were brought into market by the operation of the United States Land Office, which was extended into Florida. Many disputes arose as to the claims of lands within the territory of Florida, jurisdiction over which was transferred to the United States courts. In this case it appeared that the royal order of Spain had authorized the granting of one hundred acres of land for certain services to each head of a family. Here the grant covered two thousand acres, and the court held this an excess of power, for which reason the grant would have been void; but it was sustained on its being shown that the patentee came under another decree or order of the king.

Who Entitled to have Grant declared Void.—In both the above cases the action was by the United States against the grantee, and both grants were considered void for the want of *power* in the agent or officer issuing the same.

This objection to a grant, that it was void for want of power in the officer issuing the same, could be made available by any defendant in an action of ejectment in a strict court of law, because if the grant is void for one purpose, it is void for all purposes, and can be shown in a collateral proceeding as well as in a suit directly between grantor and grantee. For instance, if the land had been previously granted by a public patent, and the land not subject to entry and grant, or for any other reason, the grant would be *void*, a defendant in ejectment could rely on the same successfully.*

* Hoover *v.* Thomas, Phillips Law (N. C.), 185; Stanwire *v.* Powell, 13 Iredell, 312; 2 Sneed, 63; 6 Peters (U. S.), 691; 7 Bax. (Tenn.), 603; 2 Overton

But where it is asserted that the grant is only voidable, that it was issued through fraud, accident, or mistake, this defence cannot be made in a collateral way, but it must be through a proceeding by the government or State—the grantor against the grantee being a proceeding directly between the parties to the grant. A grant executed by mistake or inadvertence in the agent, as well as upon false suggestions amounting to fraud, will be declared void in a court of equity at the instance of the grantor. This is a common head of equity jurisdiction.*

The reasoning of the court in *Field v. Seabury et al.* is very forcible. They say: "Fraud, as it is sometimes said, 'vitiat every act'—correctly, too, when properly applied to the subject-matter in controversy, and to the parties in it, and in a proper forum; for instance, as when one of them charges the other with actual fraud; here the fraud grows out of the conduct of the parties directly to each other, or is consequential from such conduct." But when a patent or grant for land has been issued by the government or State through fraud, a third party cannot raise the objection in a trial of the title in an action of ejectment, but it is a question exclusively between the sovereignty making the grant and the grantee.

In addition to the remedy in equity, some of the States have provided by statute a remedy for the elder grantee. The statute of North Carolina, in 1798, 1 Revisal, chap. 42, sec. 31, authorized an individual aggrieved, holding an older title by grant from the State, to file a petition in the court alleging facts sufficient to constitute fraud in the issuance of the junior grant covering the same land, or in part; a *scire facias* issued, and on the trial the question of fraud was determined.

Very much the same practice prevails in England where the *scire facias* issues out of and returnable to the chancellor, but the jurisdiction on this question is a part of the common-law jurisdiction of that court, and if issue is made by the parties, the chancellor could not try, but the record was sent to the King's Bench to be tried by jury. Under this proceeding in England

(Tenn.), 118. If absolutely void for matter appearing by inspection, it may be impeached collaterally. 4 Hum. (Tenn.), 203.

* *Hughes v. United States*, 4 Wallace, 232; *Field v. Seabury et al.*, 19 Howard, 323; *Tate v. Greenlee*, 2 Murphey, 281.

the grant is declared void in toto or not at all; but under the North Carolina statute it was held, in *Hoyt v. Rich*, 4 Dev. & Battle, 533, that if the junior grant only covered a part of the land covered by the elder grant the court would grant relief.

The court came to this conclusion, not without some difficulty, under the wording of the statute, and taking into consideration the grievance sought to be remedied.

The same State, by Act of 1830, provided a mode of practice in which the State itself sought to set the grant aside for irregularities or fraud. So it is well settled in this State, that only the State or older grantee can have a grant declared void, and that no matters dehors the grant can be made in an incidental proceeding, as for instance, an action of ejectment.*

It will be observed that this statutory proceeding in favor of the aggrieved grantee does not apply to the younger grantee against the older grantee, but is only a remedy in favor of the older grantee. The equity of the statute, and the practice of the court under it, is based upon the fact that the younger grantee had full and complete knowledge of the issuance of the older grant.

But without this remedy the older grantee could, as a general rule, recover the land in an action of ejectment, in which action the oldest legal title prevails, presupposing, however, that the junior claimant exposed himself to suit by taking possession.

It was further held under this statute, that the party holding under the *vacated* grant could not be protected though an innocent purchaser. This looks at variance with the elementary principle, that a party without notice, purchasing from a fraudulent grantee, is protected; but it was the result of a rigid construction of the statute of 1798.

Exemplification of Grants or Patents.—In controversies arising out of written contracts between individuals, copies cannot be given in evidence unless it appears from proof that the original paper is lost, or in the power of the opposite party, and notice given to produce the original by the party having the power to do so; but in the case of grants and patents issued from the sovereign, they are enrolled in the office and become public records,

* *Tate v. Greenlee*, 2 Murphey, 281; *Crow v. Holland*, 4 Dev. Law, 417; *Waugh v. Richardson*, 8 Iredell, 470; *Terrell v. Manny*, 2 Murph., 375.

and at common law a copy is good, except as to those entitled to the original: *Candler v. Lunsford*, 4 Dev. & B., 19. But perhaps all the States have a statute making a properly certified copy of grants and registered conveyances competent evidence without accounting for the original. And it is apprehended that under these statutes, the party entitled to the original could read a copy, and keep the original in his pocket if he saw proper, except in case where the original was indispensable to explain some collateral question, such as a question of forgery, or the fraudulent erasure or alteration of the instrument.

Of the Exceptions contained in a Grant.—It often occurs that a grant contains an *exception* of certain lands which are not intended to pass by the grant to the grantee. In 1796 the State of North Carolina, in making a grant for a very large area of land in the western part of the State to John Gray Blount, the following appears: "Within which bounds there are 13,735 acres of land, entered by persons whose names are hereunto annexed, since the date of Blount's entries, and by his permission." This grant was frequently brought into controversy, and one principal question made was, whether this exception was not void for uncertainty in description. The courts of that State had held, in the case of *Richardson v. Waugh*, 8 Iredell, 470, that an *exception* of 5000 acres in a large tract of land is void for uncertainty, and in *McCormick v. Monroe*, 1 Jones, 13, the exception of "250 acres previously granted," was held void for the same reason. But in *Melton v. Monday*, 64 N. C., 295, it appeared that one of the names annexed to the Blount grant was that of "Gabriel Ragsdale."

The plaintiff in this case claimed under a grant to one Williams, founded on an entry of "Gabriel Ragsdale," for 100 acres.

Chief Justice Pearson said the exception was valid, that the 100 acres in the entry was described "with certainty to a certain intent in general," and then a survey was made in which the land is described "with certainty to a certain extent in every particular." The reference to the name of "Gabriel Ragsdale" was considered a sufficient identification of the 100 acres after the survey and grant: so the plaintiff recovered from the defendant, who claimed under the Blount grant.

"The granting part of a deed is not avoided by a *defect* in the

exception, but *the exception itself becomes ineffectual thereby, and the grant remains in force.*"

A grantor cannot reserve an estate inconsistent with the estate granted. The *reservation* of a right to the grantor is equivalent to a grant to him of the right by the vendee.

Of Him who has the Burden of Showing the Exception.—Where there is an exception contained in a grant the *onus* is on the party who would insist on the same.*

In the first case the plaintiff relied upon a grant for 500 acres, excepting "250 acres previously granted;" the question was on whom was the burden to show the location of the exception, and it was held the defendant who relied on the exception must show himself within the exception. It was argued that if the burden was on the plaintiff, and he was bound to show that 250 acres had been "previously granted," and it should appear that, in fact, they never were granted, then the plaintiff would recover nothing, although it was admitted that the plaintiff owned 250 acres.

The exception was void, as to the plaintiff, for uncertainty; having a grant which conveyed 500 acres with no valid exception, the title to the whole passed.

The "Entry."—*The Foundation of State Grants.*—In those States having public lands to dispose of to the individual citizen, they have statutes providing for the mode of appropriating these lands, usually by what is called an "entry," which is made in the office of the county provided by the law. They become thereby a public record, which in analogy to the registration laws, operates as notice to all subsequent enterers. This entry, when made according to the statute, and especially when described with sufficient certainty, becomes an inchoate, imperfect legal title (or an equity, as held in some of the States), which is capable of being ripened into a perfect legal title by the survey, and the obtaining of the grant within the time specified by law, which of course involves the payment of the government price for the land and the fees incident thereto. Sometimes the legislature enlarges the time fixed for the issuance of the grant, for the benefit of those who have made entries and have not perfected

* *McCormick v. Monroe*, 1 Jones (N. C.), 13; *Gudger v. Hensley*, 82 N. C., 481.

the same by survey and grant. But this curative legislation cannot affect the rights of a junior enterer who has rights attached under the law. For instance, if the first enterer has two years in which to obtain a grant, and the two years have elapsed, and *after* this two years a subsequent entry is made, it would not be competent for the legislature to extend the time for the benefit of the first enterer, the time allowed for the issuance of the grant having expired before the filing of the subsequent entry.* Because the elder enterer had a kind of pre-emption right for the period of two years and no longer, and at the end of which period the land was subject to appropriation by others.

But if while this pre-emption right exist, that is to say, within the two years, a subsequent entry is made, it would be competent for the legislature to extend the time for the benefit of the first enterer, because the junior enterer appropriated the land with knowledge of the power of the legislature to extend the time before any lapse or forfeiture of pre-emption, and cannot therefore be heard to complain.†

The Lapse of both Entries.—Under these extension acts of the legislature a question of this kind has arisen: the senior enterer has lost his pre-emption by the efflux of time; then the junior entry is made, which also expires by the efflux of time. Now the legislature being willing to relieve against this forfeiture, and being anxious, generally, to dispose of the public lands, enacts that further time is given in which to obtain grants. Now, both entries were dead, the legislature revives both, who has the preference?

* *Bryson v. Dobson*, 3 Iredell Eq., 136.

† This power of the legislature to pass extension acts is entirely consistent with the power to legislate in regard to the vacant lands of the State; but these extension acts cannot affect the vested right of a party who has made the entry *after* the elder entry had *lapsed* and *before* the extension act passed. This question has undergone a thorough investigation in Tennessee. See *Vaughn & Brown v. Hatfield*, 5 Yerger, 236; *Williamson and wife v. Troope & Luna*, 11 Hump., 265; *Sampson v. Taylor*, 1 Sneed, 600. In the latter case the defendants had made an entry, and no grant was obtained within the time, and the legislature extended the time for several years. But an interregnum occurred, the last extension act having been two months after the expiration of the previous extension act. Within these two months the plaintiff made an entry and took out a grant. The defendant also took out a grant, relying on the last extension act; but the court held that during these two months the land was open to entry, and plaintiff had such a vested right that the legislature could not affect it. The plaintiff's title held good.

At the time of the extension act both entries were in the same condition. The curative act applies equally to both; each has an equity; neither has a superior equity to the other; consequently, the one who first obtains the legal title—the grant—is preferred, upon the equitable principle that where equities are equal he who first obtains the legal title shall prevail.*

The Requisites of an "Entry."—In the first place the entry should be made strictly in accordance with the directions of the statute—some of which statutory regulations may be mandatory and others only directory.

Then the survey should be made by the proper surveyor and within the time prescribed by law, and in the manner provided.

But as to these minor requisites, they can be gathered from the local statutes and decisions of each State, which, perhaps, vary in the different States; it is, therefore, not the purpose here to notice them more particularly, the object being to notice principles of a more general character. A more general and universal requisite is that of *reasonable certainty*. The party who attempts to appropriate vacant land should designate his "entry" by such "metes and bounds," and a reference to such natural objects or monuments as will enable a person by reasonable effort and observation to locate the same from the description employed. Perhaps a description "with certainty to a certain intent in general" would be sufficient. The survey of the same will then make it "certain to a certain extent in every particular." The object of this requirement is, that the entry taker and all subsequent enterers may be guided thereby, and have notice of the true location of the land.†

If the first entry should be so vague and indefinite as not to give this reasonable notice it may be disregarded by all subsequent enterers, and a subsequent enterer who makes a special entry and obtains a grant, would be protected both in law and equity. The effect would be to subject the senior enterer to the position of a junior enterer. The party holding the oldest entry with the younger grant could not go into equity and have the holder of the older grant declared a trustee on the ground of

* *Horton v. Cook*, 1 Jones (N. C.) Eq., 270. See Story's and Pomeroy's Eq. Juris. See King's Digest (Tenn.), vol. ii., title "Land Law," p. 1410.

† *Hunton v. McGavock*, 4 Tenn. Reports (Cooper's edition), 531.

notice of a prior entry, because this "prior entry" was too vague to give notice to subsequent enterers.*

A question of some difficulty arose in the courts of North Carolina, and perhaps in Tennessee, under the statute authorizing the making of entries for vacant land; the statute requiring the enterer to specify the land he intends to appropriate, by reference to certain natural objects, as a river, mountain, or old line, so as to make the requisite certainty; but the enterer fails to comply with the statute, and makes an entry vague and indefinite; a subsequent entry is made, but before the subsequent enterer pays his money for the land, this vague senior entry is *surveyed* and thereby made more certain, and the junior enterer has *knowledge of the survey*.

This subsequent enterer relying upon the vagueness of the entry obtains the older grant.

On a bill filed to declare the grantee a trustee for the older enterer, the court, after elaborate reasoning, held that the older entry, though vague and too indefinite alone to give notice, yet the survey having been made, and that to the knowledge of the junior enterer, he was bound by it, and thereby had such notice of the prior entry as to constitute him a trustee for the prior enterer.†

In coming to this conclusion, the court held‡ that the statute, in prescribing the mode of locating an entry, was only directory and not mandatory, that a vague entry was not void as to the State, and that as to individuals it might or might not be void, depending upon future acts of the one party and the succeeding knowledge of the other; provided the knowledge was obtained

* In North Carolina the following entry was held too vague: "In Richmond County on the south side of Muddy Creek, beginning at or near the ford of the creek, where the Rockingham Road crosses." Without any further description it was held too vague to give priority over an individual claiming under entry and grant. *McDiarmid v. McMillan*, 5 Jones Eq., 29; *Monroe v. McCormick*, 6 Ire. Eq., 85; *Johnston v. Shelton*, 4 Ire. Eq., 85; citing *Harris v. Ewing*, 1 Dev. & Bat. Eq., 369.

† *Johnston & Francis v. Shelton et al.*, 4 Iredell Eq., 85; *Harris v. Ewing*, 1 Dev. & B. Eq., 369.

‡ See the case of *Winoa and St. Peter RR. Co. v. St. Paul and Sioux City RR. Co.*, 26 Minnesota, 179, which establishes the rule, that where one party gets the older title while the equity is in another, he will be declared a trustee, etc.

before the subsequent enterer paid his money for the land to the State. The court reasons upon the idea, that the act authorizing the entry also required it to be surveyed, and that the legislature must have intended the survey as a means of making the entry sufficiently certain under the maxim, *certum est quod certum reddi potest*. In the first case above, the following entry was held too vague and uncertain: "640 acres of land, beginning on the line dividing the counties of Haywood and Macon, at a point at or near Lowe's bear pen, on the Hogback Mountain, and running various courses for complement."

There is much strength in the suggestion, that this provision of the statute should be *mandatory*, and that a vague entry should be like contracts, required to be reduced to writing; when the terms are so vague that the meaning cannot be certainly collected, it should be considered void both in law and equity. And in this instance a mandatory statute would better protect the rights of subsequent purchasers. But the opinion of the court, in *Harris v. Ewing*, *supra*, is well sustained by reason. The contest between the senior and junior enterer is frequently in a court of equity, and why should a junior enterer be heard to say he *paid his money without notice*, when in truth he *had notice*. He says the entry gave me no notice. This is correct. But then the reply is, I made a *survey*, thereby made the entry certain, and of this you had notice before you paid your money. Like the party who relies on a right against an unregistered deed, yet the party had *actual* notice of the deed and its contents. It might perhaps, as well be said, that where a man sells all the oil in his store at so much per gallon, the contract is void, because the quantity is uncertain at the time of the sale, and had to be ascertained by a measurement subsequent to the sale.

It will be understood, of course, that the survey must reasonably follow and conform to the entry, otherwise a man might make an entry on one locality, and afterwards, relying ostensibly upon the entry, make a survey of an entirely different parcel of land. The effect of this would be, that because a man made an entry he had a pre-emption right to so many acres of land anywhere so they were vacant lands.

This will not do: the party is bound by the appropriation

made in the entry, and the true purpose of the survey is to determine what lands are appropriated by the entry.

The Nature of the Estate Conferred by an Entry.—Some of the cases speak loosely of an entry; in some it is said that an entry gives no estate or right, except a sort of *preference* to pay the purchase-money and obtain a grant. Would it not be more reasonable to say that the enterer, when he has complied with the regulations of law, in making the same, has an equitable estate in the land designated, the same being subject to entry? Very analogous to the estate held by the vendee under a title-bond, the vendee's equity consists in the right to pay or tender the purchase-money, and have title made; in the case of the enterer of vacant lands, he pays the fees of the officer, before whom the entry is made, which is in some sense a part of the consideration; he likewise pays the surveyor for locating the same, whereupon the State says he is entitled to a grant on payment of the price fixed by law. And while the State could not be compelled to a specific performance, yet the public faith is pledged to this, and a refusal would not meet the sanction of an honest public opinion. But in a contest with an older grantee, who entered with notice, he has an equity to have the older grantee declared a trustee, and it would seem that he has as high an equity as the vendee holding under terms of purchase.

Some of the States have a statute allowing a party to recover in an action of ejectment, on a certificate of survey made and returned to the Land Office of the United States (the price having been paid), before a patent has been issued by the United States.*

Even *mining* claims in California are recognized by possession, and as between individuals a recovery can be had in ejectment; not valid as to the government of course. It is considered as a vested right of property founded on possession and appropriation. Prior to 1860 these claims were transferable by parol.†

Pre-emption Right in certain Persons to enter Land.—Some of the States have a statute giving preference to the party who actually occupied the vacant land; and therefore a party out of pos-

* See *French v. Spence*, 21 How. (U. S.), 228 (Statutes of Indiana).

† *Hughes v. Devlin*, 23 Cal., 501; 30 Cal., 360; *State of California v. Moore*, 12 Cal., 56.

session was required to give notice to the squatter, that within a certain time he proposed to enter and obtain a grant for the land so possessed. If the squatter himself saw proper to appropriate the land within the time fixed by the notice, he had the preference, and was entitled to the grant.

In like manner the Congress of the United States has passed what is called a general pre-emption law, by which the party who has the actual possession of these government lands shall have the right to go to the register and receiver and make the entry. Perhaps this was regulated by the Act of 1830. Under this act of Congress much litigation has been had both in the State and United States courts, one important instance of which is the case of *Garland v. Wynn*,* of which more will be said in a subsequent part of this chapter.

Of a Grant Issued upon a Lapsed Entry.—If the grant is issued it is not void, although the entry had lapsed by the efflux of time.† But it was held in this case that an entry in the name of a non-resident of the State was void; and farther, that although the entry was void if taken in the name of a non-resident, yet if the grant issued in the name of a party capable of taking and holding by the laws of the State, the grant was valid. In those States where the grant relates to the date of the entry, and has the effect of the legal title from that date, the grant must refer to the entry and profess to be founded on it. Where there is a discrepancy between the entry and the recital of the same in the grant, the original entry will prevail.‡

The Doctrine of Relation.—It is well settled that an entry in the United States Land Office, on which a patent issues, no matter how long thereafter, shall relate to the entry and take date with it.§ The “fiction” of relation is, that an intermediate *bona fide* alienee of the incipient interest may claim that the patent inures to his benefit by an *ex post facto* operation, and receive the same protection at law that a court of equity would give him.||

* *Garland v. Wynn*, 20 How. (U. S.), 6.

† *Wilson v. Western N. C. Land Co.*, 77 N. C., 445.

‡ 4 Heisk. (Tenn.), 702.

§ The United States is not estopped by a judgment in ejectment. *Carr v. United States*, 98 U. S., 433.

|| *French v. Spence*, 21 How. (U. S.), 228; *Ross v. Borland*, 1 Peters, 655. For the purpose of the statute of limitations, a sheriff's deed of land sold under

We have already noticed the rule as to two of the States on this doctrine of the relation of the grant to the entry.

The State or Government not bound by Estoppel.—The State is at liberty (unlike an individual) to aver that at the time a grant was issued it had no title. And this rule extends to an individual claiming under the State.*

Another conspicuous illustration of the doctrine of *relation* is that of the settlement of the incipient claims of individuals under the governments of France, Spain, and Mexico, from whom the United States has obtained so much of this vast country on the South and Southwest. For instance, after the conquest of California, in 1846, the Congress of the United States, on the 3d March, 1851, passed a law creating a board of commissioners, with judicial power, whose duty it was to pass upon all claims of citizens by virtue of "any right or title" claimed under the Spanish or Mexican governments; these claims were to be presented, the proof taken, etc., and the right of appeal to the courts of the United States allowed. When these claims were adjudicated the United States issued a grant, which had simply the effect of a quit-claim deed from the United States; and the grant, when issued, bore date by the doctrine of *relation* to the date of the *filing of the petition* and claim before this *arbitration court*, so to speak.† The adjudication of this board of commissioners became a very high judicial record, and could not be impeached collaterally.‡ The Treaty of Guadalupe Hidalgo guaranteed protection to all claims held under the Mexican government. These decisions upon the California land titles constituted a large space of interesting learning in the reports of the United States, from 1851 to the present time.§

execution relates back to the date of the levy, and invests the purchaser with the right of entry from the time of sale. He acquires by his purchase not merely an equity, but an inchoate legal title, and the statute begins to run against the right of entry from the time of the sale, and not from the date of the deed. *Chalfin v. Malone*, 9 B. Mon. (Ky.), 596.

* *Taylor v. Shufford*, 4 Hawks, 116; *Candler v. Lunsford*, 4 Dev., 407.

† *Beard v. Feday*, 3 Wall., 478; *Lynch v. Bernall*, 9 Wall., 315.

‡ 9 Wall., *infra*.

§ The controversies in reference to California land titles in the United States courts have developed and settled many interesting questions of land law, and the examination of the same will well repay the studious practitioner. The following decisions are but a portion of the numerous cases on California land

Indeed, as already indicated by the references to cases, much of the most complicated and interesting land litigation of this country has appeared in the courts of the United States, growing out of the acquisition of territory from foreign governments, and the erection of new States out of the territory thus belonging to the United States. The *incipient* and *vested* rights of individuals in portions of these lands gave rise to much legislation and a wide field for judicial investigation and construction. Thus we have the act of Congress in 1804 erecting Louisiana into two territories, with provisos that all valid, *bona fide* grantees from the Spanish government, prior to a certain date, are *protected*, and then declared *void* certain grants issued by France while the soil really belonged to Spain.

In 1805 a law was passed (very similar to the one noticed in reference to California land titles) providing a commission or court to ascertain and decide on these titles. In Florida and Missouri and Louisiana the like condition of affairs produced immense litigation. It has been necessary for the court to go through all the laws, usages, and customs, edicts, proclamations, etc., of France, Spain, and Mexico, as to granting lands to individuals.

Then the claims of the Indians, and those holding under them, presented great controversy.*

The erection of Tennessee and Kentucky out of territory belonging to North Carolina and Virginia, gave rise to much litigation, each of a peculiar character. The opinions of Catron, Marshall, McLean, and Story have shown an infinite variety of questions from these States, whilst the State reports of these States have gone largely into questions of land law.

The United States as a Source of Title.—"All the lands in the

titles: 18 How., 556; 23 How., 312; 22 How., 443; 1 Wall., 439; 2 Wall., 444; 6 Wall., 363; 3 Wall., 343; 24 How., 346; 2 Wall., 279; 21 How., 170; 5 Wall., 827; 20 How., 413; 3 Wall., 478; 18 Wall., 285; 1 Wall., 582; 21 Wall., 387; 3 Wall., 478; *ib.*, 752; 10 Wall., 224; 22 How., 274; 23 How., 273; 17 How., 542; 18 How., 1; 13 Wall., 480; 11 Wall., 566; 5 Wall., 536; 8 Wall., 373; 2 Wall., 562.

* Jos. M. White, Esq., in 1839, published all the laws of these governments in reference to the mode of disposing of the territory to individuals,—all translated into English. See White's *New Recopilacion*, vol. ii. See argument by Mr. White in 1835 in favor of the Indian titles in Florida in the same work.

territories, not appropriated by competent authority before they were acquired, are, in the first instance, the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles as the government may deem most advantageous to the public use, or in other respects most politic. This right has been uniformly reserved by solemn compacts upon the admission of new States, and has been recognized by the sovereign States,"* within which much of those lands is still remaining. The government, through the machinery of the General Land Office, and the statutes upon that subject, have provided for the transmission of the title to individuals; and no title can pass otherwise than by a patent from the United States; and on the question whether the land has once been the property of the United States, and has *passed* to the individual, the following fundamental rule was recognized in the case of *Wilcox v. Jackson*, 13 Peters, 517: "We hold the true principle to be this, that whenever the question in any court, State or Federal, is, whether the title to land which had been once the property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State, is subject to State legislation, so far as that legislation is consistent with the admission that the title passed according to the laws of the United States."

The case of *Irvine v. Marshall* originated in an act of the territorial legislature of Minnesota, which act had modified the doctrine of uses and trusts, and especially in respect to *resultant* trusts arising where the land had been purchased in the name of one man with the funds belonging to another. Marshall had bought at the request of Irvine a quarter-section of land at a public sale, in pursuance of the proclamation of the President of the United States. Marshall afterwards refused to make title (having taken a "patent certificate" in his own name) to Irvine, who had furnished the money, and his refusal was sustained by the court of last resort in the Territory, upon the construction of the statute of the Territory, which provided, in substance, that in

* *Irvine v. Marshall et al.*, 20 Howard, 558.

a case of this kind there was no *resultant trust* in favor of the party furnishing the money, but that the title passed from the United States to the agent, Marshall, who could transfer the same discharged of such equity.

The majority of the court, opinion by Justice Daniel, held that the act of the Territorial legislature was a usurpation of power, being in conflict with the Constitution and laws of the United States; holding that the United States alone had the power to direct in what mode the title to the public lands shall be conveyed, and the effect thereof; that, by virtue of the judicial power vested in the courts by the Constitution of the United States (art. 3, sec. 2, clause 1), and the statutes in pursuance thereof, these courts had the equity jurisdiction to regulate all questions of trust; and all suits of a civil nature, "at common law, or in equity," was a part of their jurisdiction. The reason assigned with most plausibility was that it was to the interest of the government to sell their lands as quickly as possible; that the same was a trust formed for all of the United States; and that laws in regard to the transfer and effect of these titles should be *uniform*. They also relied on the case of *Wilcox v. Jackson*, in which it was held that an act of the legislature of the State of Illinois was void, which had provided that a patent certificate (an inchoate title) should have the same effect in an action to recover land as a patent from the United States. The court say that the only evidence that the title has passed is a *patent* from the *United States*; and that, therefore, it is not competent for a State in which public lands are situate to say that any other mode of conveyance shall constitute a *title*.

It was conceded, however, in the case of *Irvine v. Marshall*, that after the title has passed from the United States, in the mode recognized by its laws and regulations, to an individual of the Territory or State, then the Territorial or State legislature had the power to legislate upon the same, in directing the mode of alienation, descent, etc. But, in this case of *Irvine v. Marshall*, Justices Catron, Grier, Campbell, and Nelson joined in a dissenting opinion, which, we think, is better sustained upon principle and sound reasoning. The dissenting opinion puts the case upon the ground that the property in this case "had passed" to an individual, that it had passed to the agent, instead of the principal,

and, that being so, it was competent for the Territory or State to say who was the *owner* of this inchoate title, and what were the relations of *trustee* and *beneficiary*. They say the policy of this statute was to prevent secret fraudulent conveyances to defraud creditors; that it was the common practice to place the title to property in third persons while the whole of the beneficial was in another. It was said that New York had a similar statute, passed in 1830, from which the Minnesota statute was taken. The dissenting opinion says: "It is true, the laws of Congress provide for and regulate the sale of the public lands, and, in doing so, provide for this inchoate title to be given to the purchaser on paying of the purchase-money. And if one undertakes to question this title, the law of Congress is called in as the highest evidence of it. Thus far the law of Congress operates, of whatever nature or character that may be. But beyond this, whether A. or B. owns this inchoate title, whether A. has made a good sale and transfer of it to another, or such a one as the municipal law will give effect to, are questions which do not concern the Federal authority."

It was said, in the same argument, that in many of the States and Territories, for years after their organization, most of the land was held under a "patent certificate" simply.

Here the government gives the "patent certificate" through the proper officer; now the real question in the case was, who owned the inchoate title secured by the patent certificate? That question, it seems, should depend upon local law, which is the conclusion arrived at by the minority of the court.

Of the Cancellation of a Patent.—If a patent issued by the Commissioner of the Land Office be fraudulently obtained, or negligently issued to an improper person, the Commissioner, under the advice of the Attorney-General, may legally cancel such patent.*

Under this head might be mentioned a class of contests as to the validity of the patent growing out of the pre-emption laws, and under different acts of Congress on that subject. This is where two or more persons claim a pre-emption right to the same section or quarter-section of land.

* *Doswell v. De La Lanza et al.*, 20 Howard, 29.

These contested claimants go before the register and receiver of the local land office and have the same decided, and the right of appeal is allowed to the Commissioner of the General Land Office. But it became an important question whether the decision of the Land Office was a finality, or could the courts go behind this decision, and decide the legal and equitable rights of the parties growing out of this special transaction. This question is decided in favor of the power of the courts in the case of *Garland v. Wynn*, 20 Howard, 6.

In this case, Wynn, who had the older patent, the local land office annulled the same, and issued the patent to Garland, and this action was sustained by the Commissioner of the Land Office. The bill was filed to have the patent of Garland set aside upon the grounds that by falsehood and perjury the Land Office had been imposed on, and made to believe that the party under whom Garland held had such an occupancy of the northeast quarter of Section 18 as to entitle him to the preference of entry, whereas, in fact and truth, his occupancy was on the northwest quarter of Section 17, adjoining the section in controversy. It was insisted in the case, by the respondent in his answer in the nature of a distinct plea, that the court had no jurisdiction to set aside or correct the decision of the *Register and Receiver*, and that their action was final and conclusive on the courts.

But the court announced the following principle as applicable to such cases: "The general rule is, that where several parties set up conflicting claims to property with which a special tribunal may deal, as between one party and the government, regardless of the rights of others, the latter may come into the ordinary courts of justice and litigate the conflicting claims. That the regulations of the Commissioner of the Land Office, whereby a party *may* be heard to prove his better claim to enter, does not oust the jurisdiction of the courts of justice."

The opinion quotes many authorities to sustain the position.

Of whom the United States obtained Title.—The United States has never obtained lands through conquest, but generally by cessions from the individual States, and from France and Spain, and by treaties with Great Britain and Mexico.

It is true that, as to the Indian lands situate within the Territories, the United States claimed the right to extinguish the In-

dian title, either by conquest or purchase. The Indians were merely occupants of the land, being considered incapable of conferring absolute title to any other than the sovereign of the country.* The title of European nations to the land in this country was founded on discovery and conquest; prior discovery gave the title to the soil, subject to the right of occupancy by the natives.† The Indian, therefore, could not sue on his aboriginal claim in the courts of the United States.‡

The States of Virginia, Massachusetts, Connecticut, and New York, before the adoption of the National Constitution, ceded to the confederacy the vast territory composing now the States of Ohio, Indiana, Illinois, and other Northwest States; and North Carolina, South Carolina, and Georgia made a cession of all their unpatented lands, out of which the States of Tennessee, Alabama, and Mississippi were composed.

Then, when the Constitution was adopted, a "more perfect union being established," it gave Congress the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States, and to admit new States into the Union, art. 4, sec. 3.

Some of the States which were subsequently formed out of this ceded territory attempted to ignore the right of the General Government to these unappropriated lands. Indiana in 1829, and Mississippi in 1830, advanced a claim to the exclusive right to the soil and eminent domain of all these lands within their acknowledged boundary.

But this claim had no foundation, and patents for these lands issued by the State to an individual have been declared absolutely void. Because the cession of these territorial claims by the several States were requested and called for by a resolution of the Confederation Congress on 10th October, 1780, and these were made with the understanding and contract that they were to be "disposed of to the common benefit of the United States." Reserving the vested rights of all individuals whose rights had accrued before the cession of the same to the General Government.§

* Johnson v. McIntosh, 8 Wheaton, 543; Fletcher v. Peck, 6 Cranch, 142.

† 1 Kent Com., 258.

‡ Cherokee Nation v. Georgia, 5 Peters, 20.

§ Green v. Biddle, 9 Wheat., 1.

Besides, the Ordinance of July 13, 1787, in regard to the government of the territory of the United States northwest of the river Ohio, provided that the legislatures of the districts or new States to be erected therein should "never interfere with the primary disposal of the soil by the United States, in Congress assembled, nor with any regulations Congress may find necessary for securing title in such soil to the *bona fide* purchaser."

The right of the United States to acquire the foreign territories of Louisiana and Florida by purchase was for a time a doubtful question, but this power was sustained by the Supreme Court of the United States.* This right was held to exist under the power to make treaties, which is done by the President and two-thirds of the members of the Senate present.

Likewise, under the power to admit new States, the resolution of Congress, March 1, 1845, brought Texas, a foreign and independent State, into the American Union; that State, of course, in its independent character, consenting to the terms of union. This was done not under the treaty-making power of the Constitution, but by a latitudinous and liberal construction of the Constitution in regard to the power to admit new States formed out of the ceded territories formerly belonging to certain of the thirteen original States.

What Title Passes by the Grant—Mines and Minerals.—It need only to be stated in this connection that, as a general rule, the grant of lands by the State or the United States, being at the time subject to entry and grant, conveys the highest title which the individual is capable of holding in real estate; and the owner is bound by no fealty, except that to the lord paramount, the government, which is simply the oath of allegiance, which, under certain circumstances, the citizen may be required to take.†

A restriction, however, upon this title might be mentioned. In charters from the king, under the English law, the grantee had no right to any mines which contained gold and silver. This was retained by the high prerogative of the crown as requisite for the coining of money for his subjects. It did not apply to any other metals. The statute law of the State of New York

* American Ins. Co. v. Canter, 1 Peters U. S., 511.

† Kent Com., 3d vol., 512.

asserts the right of the State as a sovereign over mines to the extent of the English rule, with certain definite limits.*

But in the absence of a statute of this kind, and in the absence of a reservation or exception in the patent, either from the United States or either of the States, the mines and minerals pass to the grantee as a part and parcel of the land.

Of the Recitals in a Grant.—It is sometimes contended that a public grant, when admitted, is evidence both of the facts it recites, leading to the foundation of the title, and all other facts legally inferable by either from what is apparent on the face. This is true for the purpose of showing the consideration upon which the patent is founded, and the authority by which it is issued.

But suppose it is attempted to show from the recitals a confirmation, by an act of Congress, that the title existed in the party at an earlier date than the patent offered bears, this could not be evidence of these facts so as to overreach a contesting title, thereby making the paper have effect at a date anterior to its own date.†

No doubt these acts of Congress, or other record recited in the grant, might be shown in rebuttal to attack the title offered in opposition. These records might show the invalidity of the opposing title, and at the same time support the validity of the grant at its date. For instance, suppose the grant, from its recitals, purports to be based on an act of the legislature or Congress, would they be evidence of the existence and effect of such an act?

Statutes of Limitation do not Affect the Title to Land while the Ownership is in the Government or State.—It is well to remark that the public lands are held as a trust fund for the benefit of all the people. The law provides how the individual may become the owner thereof. In no other way (except, possibly, by prescription, and under the doctrine of presumption) can the government or State part with the title.

The maxim, *nullum tempus occurrit regi*, is applicable to the United States government, and the several States in their sovereign

* N. Y. Revised Statutes, 3d edit., vol. i., 322.

† *Marshall v. Brooks et al.*, 8 How. U. S., 223.

capacity.* This rule applies where the State or government is not expressly mentioned in the statute. The State, of course, has the power to apply the acts of limitation to the State; and in some of the States, especially Texas, the act provides that the period of limitation will bar the State in behalf of the occupant of the land.†

So the statute of 21 James I., ch. 5, barred the crown after sixty years of quiet, uninterrupted possession. The statute 9 Geo. III., ch. 16, extended the statute to the king himself.‡ But if the State be the assignee of an individual right, or become a stockholder in a corporation, and therefore a party to all suits that may arise affecting the property, the doctrine of *nullum tempus occurrit regi* does not apply. If the sovereign becomes a member of a trading company he divests himself with reference to the transactions of the company of the prerogatives of sovereignty, and assumes the character of a private citizen.§

CHAPTER VI.

OTHER LINKS—DEEDS—WILLS—SETTLEMENTS—LEASES, ETC.

WHATEVER may be the form of the action to try the title to land, whether called ejectment, a real action, or simply an action to recover land, the fundamental rules of law and evidence are the same. Many of these principles of law and rules of evidence are peculiar to trials for this kind of property, and they are well fitted to subserve the ends of justice. England has her "Com-

* United States v. Hoar, 2 Mason (Cir. Co.) Rep., 312, per Mr. Justice Story; Inhabitants of Stoughton v. Baker, 4 Mass., 528; Weatherhead v. Bledoe, 2 Overt. (Tenn.), 352; 19 Miss., 667; 27 Ala., 418; 33 Penna. Stat., 445; 48 Me., 516; People v. Gilbert, 18 Johns. (N.Y.), 228; Gore v. Lawson, 6 Leigh (Va.), 258; Wilson v. Hudson, 5 Yerg. (Tenn.), 398.

† Jones v. Borden, 5 Texas, 410.

‡ Goodtitle v. Parker, 11 East, 488.

§ Bank of the United States v. McKenzie, 2 Brockent. (Cir. Co. R.), 393; Angell on Limitations, ch. 5, pp. 28-34; Swasey v. N. C. R. Road Co., 71 N. C., 571.

mon Law Procedure Act," of 15 and 16 Victoria, ch. 76, in which the fiction is abolished, and many, if not all of the United States, have materially changed or abolished the old action; and the code system has superseded the old practice to a large extent, but still the essential features and characteristics of the old action are retained, and the leading doctrines and principles are the same. The student need only to learn these principles thoroughly, to enable him to try an issue involving title to land in England, Maine, or California. The action may be called "ejectment" in England, a "real action" in Maine (and it is called such in that State), an "action to recover land" in California; nevertheless, it is a suit for the possession of land, dependent on the question who has the legal title, and the consequent right of entry. It is for this reason that so much attention has been given to the old action, with its fictions and feigned issues, of which it has been said not a single allegation in the declaration was the truth, and that the recovery depended upon the establishment of a proposition not mentioned in the pleadings, to wit, the title of the lessor in the fictitious lease.

Title-Deeds.—In England as well as this country, almost all the old common-law modes of conveyance have either been greatly simplified or entirely abolished. We have:

1. *Purchase deed*, which comprehends grant and assignment.
2. The *mortgage*, to pledge.
3. The *lease*, to give temporary possession.
4. The *settlement*, whereby estates can, subject to due precaution, be preserved in families.
5. The *will*, which can either operate as a settlement, or effect the transmission of property from one person to another.*

These instruments constitute most of the written evidence in controversies touching real property, the purchase deed being the written evidence most universally presented in the trial of an action of ejectment.

The *lease* and *will*, too, very frequently become evidence in the courts of law, while perhaps the *mortgage* and *settlement* are among the favorite subjects of the courts of equity. The *construction of wills* likewise comes more specially within the province of a court of equity.

* Deane's Conveyancing, 314.

The most ancient and simple form of conveyance at the common law, was feoffment, with livery of seisin. This formal delivery of possession was what gave notoriety to the title, and in those days a conveyance which did not operate by the transmutation of possession was not recognized in the courts of law. The bargain and sale, at this time, was only a *contract*, which the courts of equity enforced in opposition to the rulings of the law courts.

As early as the Conquest, in addition to the putting into possession through the ceremony of livery of seisin, a written deed or charter was made as evidence of the fact of feoffment. It is a curious fact, that the deed made at the time of the feoffment did not convey the title; the title passed by the feoffment, and the deed made at the same time was only intended as written evidence of the feoffment: in which we have the anomaly of a transaction in *parol* passing title to land, while the *writings* were only used as evidence of what existed in *parol*.

But the statute of uses and the statute of frauds worked a radical change in this regard. When the bargain and sale became a legal title by virtue of the statute of uses, it became necessary to give notoriety to this deed, as feoffment was made notorious by actual putting into possession. Now the deed of bargain and sale was to operate without a change of possession in fact. So the statute of 27 Hen. VIII., ch. 16, provided what is called the "Statute of Enrolment," providing that the title, in the deed of bargain and sale, should pass only on condition of a writing sealed and enrolled within six months. This was supposed to prevent secret conveyances. This enrolment in England corresponds to our acts of registration, in most if not all of the United States.

It should be mentioned, however, in this place, that five years after the statute of uses came the statute of wills, 32 Hen. VIII., ch. 1, and amended by 12 Car. II., ch. 24. At common law, prior to this time, as all conveyances had to operate by transmutation of the possession, of course a title by will could not exist, and, therefore, a man had no authority to dispose of his land by will until the passage of the statute of wills. Another very important act of Parliament was soon the result of the changes already made, to wit, the statute of frauds, 29 Charles II., ch. 3, making

it necessary to reduce all wills and contracts for land to writing. Of these several statutes more will be said in the progress of this treatise.

What is a Deed of Bargain and Sale?—It is simply the result of a private contract between the parties by which, for a consideration paid by one party, the title passes to the other. As has been shown, before the statute of uses, a deed by bargain and sale did not pass any title in law, for the reason that no possession passed to the bargainee, and these instruments were fostered and enforced alone in the Court of Chancery. Says Sanders: "A bargain was made, or a contract entered into, for the sale of an estate; the purchase-money was paid, but there was no conveyance at all of the legal interest, or a conveyance defective at law by reason of the omission of livery of seisin, or attornment; that court properly thought, that the estate ought in conscience to belong to the person who paid the money, and, therefore, considered the bargainor or contractor as *trustee* for him."*

This equitable interest in land thus raised in the first instance by the payment of money upon a mere contract, or a conveyance inoperative at law, was converted by the statute of uses, 27 Hen. VIII., chap. 10, into a legal title. This statute had the effect to supersede the solemnities of livery of seisin, by making the delivery of the deed of bargain and sale have the effect to transfer the possession to the bargainee. The reason of this is the statute of uses was intended to turn the use into a legal estate. And the bargainee having paid the purchase-money, the bargainor was trustee for the bargainee; in other words, the bargainee had a use in the land according to the holding of the equity courts, and the statute of uses converted this use into a legal estate, which has since been recognized in a court of law. So a direct conveyance to a purchaser for value would even at law raise a use in his favor.†

And thus it is, that a deed of bargain and sale founded upon a consideration, when delivered to the bargainee and enrolled or registered, becomes as effective in law as a feoffment with livery of seisin did before the statute of uses.

The Deed must contain the word "Heirs."—Except where the

* Sanders Uses and Trusts, vol. ii., 53.

† Deane's Principles of Conveyancing, 195.

rule is changed by a statute in some of the States, it is necessary that the words "heirs" should appear in the deed, otherwise the bargainee only takes a life estate.

Thus a conveyance of this kind, "and his generation to endure so long as the waters of the Delaware shall run," was held only to convey a life estate.*

When fees were first established, the deed which usually followed livery of seisin expressed that the land had been granted to the tenant or "feoffee" and his "heirs."

The word "heirs" originally meant only a man's issue; they alone being the persons entitled to succeed him under the feudal idea. Gradually, however, it became allowable, if a tenant died without issue, for, at first, a brother, and finally, all collateral relations, provided they were descended from, and were of the blood of the feoffee, to succeed him in his feud, and the word "heirs" thus came to include all such persons. The heir, whoever he might be, was entitled to succeed to a fee, not by reason of any favor of the tenant in possession of it, but because he had been designated for that purpose in the grant of the fee.†

The rules of descent are fixed in the different States by a statute of descents, to which reference is conveniently had, with the constructions thereon by the different adjudications of the courts.

The Form of the Purchase Deed.—"The Saxons, in their deeds, observed no set form, but used honest and perspicuous words to express the thing intended with all brevity, yet not wanting the essential parts of a deed, as the names of the donor and donee, the consideration, the certainty of the thing given, the limitation of the estate, the reservations, and the names of the witnesses."‡

But the English system of conveyancing was for a long time in strong contrast with this brevity and simplicity, being cumbersome, tedious, and replete with refined and artificial verbiage.

But the statute of 8 and 9 Victoria provides a shorter and more simple form of conveyance, and leaves it at the option of the conveyancer to use this, or the one more technical and redundant in form.

Judge Kent says, in the United States, generally, the form of a conveyance is very simple. That a deed would be perfectly

* Hilliard's American Law, vol. ii., p. 6.

† Deane's Conveyancing, 24.

‡ 4 Kent, 461.

competent in any part of the United States, to convey the fee, if it was to be to the following effect: "I, A. B., in consideration of one dollar, to me paid by C. D., do bargain and sell, or grant to C. D. and his heirs, a lot of land (described); witness my hand and seal." The deed must be sealed and delivered in order to pass title, and generally under the registration laws it must be probated and registered before it can be read in evidence on the trial of ejectment.

Parties to a Deed.—These should, in general, comprise besides vendor and purchaser every person from whom any legal or equitable estate or interest is transferred to the purchaser; and also all persons who enter into any of the covenants of the deed.*

Says this same author: "The most convenient order of their arrangement is to place first the party or parties from whom the legal estate in the property is transferred; next, any person whose concurrence is requisite, or who enters into any covenants; and last, the party or parties to whom the legal estate is to be given by the deed. The names and descriptions of the parties should be set out in full, so as to prevent any difficulty in their subsequent identification; but a deed is not invalidated by a defect in this respect, so long as the name or description given to any party is that by which he or she is generally known."†

Although an invariable practice, it is not absolutely necessary to mention either the Christian name or the surname of a party provided he be sufficiently designated in some other way; for instance, the "wife of A.," or "eldest son of B." A conveyance to the *heirs at law* of a deceased person is good, as the persons who are to take can be ascertained by extrinsic evidence. But a conveyance to the heirs of one who is living at the time is void for uncertainty. A conveyance to A. and her children is good. A deed cannot bind a party who seals it unless it contains words expressive of an *intention* to be bound.‡

If the estate belongs to a *feme covert*, and the husband makes a formal deed, and she merely at the close of the deed relinquishes all her rights and signs it, her estate will not pass.§ But it is otherwise where one of two *joint-tenants*, or a remainderman, joins thus in a deed. In the case of the wife who owns the estate,

* Deane's Conveyancing, 348.

† Ibid.

‡ Hillard's American Law, 203.

§ McFadden v. Rogers, 70 Mo., 421.

she should become a party to the deed, not by simply signing the same, but in the body of the deed, thus showing an intention to be bound by the recitals and covenants of the deed.

If an attorney have authority to make the deed, it must not be in his own name, but in the name of his principal. A power of attorney to execute a deed must generally be under seal. A man who cannot write may authorize verbally a person to sign the deed in his presence, and he is bound by it. He is present and recognizes the act, and it is as binding as if he had used the pen himself.*

One who is made grantee without his knowledge, and the same is recorded, an immediate disclaimer upon having notice disproves a legal delivery.

A deed is void if made to a *dead person*. The grantee must be *in esse* at the time.†

If the deed is made by an infant it is voidable; he can affirm or disaffirm the same after he arrives at majority. Estoppel *in pais* does not apply to an infant, therefore, on notice of disaffirmance and suit brought to recover the property; what the infant said at the time the deed was made, respecting his age, is not admissible against him.‡

If a minor brings an action to recover against his *own deed*, he must show some act of disaffirmance in a reasonable time after becoming of age. If the party making the deed is incompetent to make a deed on account of deficiency of mind, or the same is made under duress, or is obtained by fraud, it is void *inter partes*. If made by parties capable of making a deed, but in fraud of creditors or purchasers, the deed may be good between the parties, but void as to creditors and purchasers. But these questions, as, who can have a deed declared void, and as to whom the deed is void, and many other questions of fraud, will be discussed at another place in this work.

These questions cannot generally be settled in an action of ejectment, of which we are now speaking.

* Bird v. Decker, 64 Maine, 550.

† Morgan et al. v. Hazlehurst et al., 53 Miss., 665; Hunter v. Watson, 12 Cal., 363, 376; 2 Washburn on Real Prop., 239.

‡ Sims v. Everhardt, 102 U. S., 751.

*There must be a Consideration in a Purchase Deed.**—Under the common-law conveyances no consideration was necessary as between the parties; the statutes of Elizabeth made them void as to creditors and subsequent purchasers.

In those conveyances the donee simply performed the feudal service required, and no consideration in a pecuniary sense was requisite.†

A deed in some sense implies a consideration.

But the rule is different now as to those conveyances which operate under the statute of uses; as, for instance, the bargain and sale, and the covenant to stand seised to the use of another. Before the statute of 27 Hen. VIII., these conveyances, not operating by the transmutation of the possession, were not regarded in a court of law, but the courts of equity enforced the contract of bargain and sale, on account of the consideration paid by the bargainee, the bargainor being held as trustee for the bargainee. So in the covenant to stand seised, the consideration being the relation in blood, the party being seised and making the covenant held the same to the use of the covenantee. Now the statute of 27 Hen. VIII. declared in effect that the party having the beneficial interest or use should be considered as seised of the legal title. The conveyance of bargain and sale, before this, was, in effect, a declaration of uses; for the use being served out of the seisin of the bargainor, it merely served to declare the use to the bargainee.‡ Under the statute, if land was conveyed to A. and his heirs in trust for B. and his heirs, or in confidence that he and they should take the profits, the legal estate is vested in B.§

This merging of the legal estate into the equitable estate of the bargainee who had paid the consideration, made the deed of bargain and sale operate precisely as those conveyances which operated by way of the transmutation of possession, but this did not prevent its requiring a consideration. So in this regard a bargain and sale is just what it was before the statute of 27

* In North Carolina, the later cases have held that under the Act of 1715 a deed of bargain and sale is valid between the parties without a *consideration*; that *registration* is a substitute for *livery of seisin*. *Love's Exs. v. Harbin*, 87 N. C., 249; citing *Mosley v. Mosley*, *Ibid.*, 69; *Ivey v. Granbury*, 66 N. C., 223; *Hogan v. Strayhorn*, 65 N. C., 279.

† *Harrell v. Watson*, 63 N. C., 454.

‡ *Sanders, Uses and Trusts*, 220.

§ *Sanders, supra*.

Hen. VIII.; it took a consideration to support it then, and a consideration is now necessary to support it. And when Mr. Blackstone says, "a deed must be supported by a consideration," he has reference only to deeds which took effect under the statute of uses and the statutes of Elizabeth. See the elaborate opinion of Ch. Justice Pearson on the difference between a deed at common law and those operating by the statute of uses, and the effect of the Act of 1715, of that State, in regard to deeds, in the case of *Hogan v. Strayhorn*, 65 N. C., 279.

The colonial legislature of North Carolina, in 1715, passed an act providing "no conveyance or bill of sale of land shall be good unless the same shall be acknowledged, etc., and registered in the county where the land lies, and all deeds so done and executed shall be valid and pass the estate in land without livery of seisin, attornment, or other ceremony of law whatever."*

The court of that State, in *Hogan v. Strayhorn*, held that the effect of this statute was to make the deed pass the legal title in as complete a manner as if livery of seisin had been performed in a feoffment; but that the deed did not operate as a bargain and sale in that case, for the want of a consideration. If there be a consideration there is a trust in favor of the vendee; if not it results to the vendor under the statute of 27 Hen. VIII.

A consideration is necessary to conveyance to use, and as to *bona fide* creditors and subsequent purchasers. An acknowledgment of consideration in the deed is held conclusive, or at least *prima facie* of the fact of payment as against the grantor, but in cases of fraud the rule does not prevail; in this instance the real facts and circumstances may be shown.

If the consideration is paid to a third party at the consent of the grantor it is sufficient.

It is but the most familiar learning to say that there are two kinds of consideration, *valuable*, and *good* consideration, which is sometimes called a meritorious consideration.

A valuable consideration is founded on something deemed valuable in a pecuniary sense, as money, goods, services; and to this may be added, though depending upon a different idea, marriage. Under this latter it has been held that the seduction of an inno-

* Revised Code, ch. 37, sec. 1.

cent woman by a pretended marriage, is a valuable consideration for a deed subsequently made to her and her children.*

A *good* consideration is founded upon natural love and affection between near relations by blood. It has been held, also, that the consideration applies to relation by affinity.†

A Covenant to Stand Seised to Uses.—While on the doctrine of consideration it will not be a great digression to speak of a covenant to stand seised. This instrument is always founded upon a *good* consideration. This is a conveyance by which a person seised of lands covenants to stand seised of them for the use of another; and in order to render a covenant to stand seised effectual, the covenantor should have a vested estate in possession, reversion, or remainder. Therefore, a covenant to stand seised of land which the covenantor shall afterwards purchase is void.‡

No use can be raised under this conveyance for any purpose in favor of a person not within the domestic relations. A stranger cannot take, even as trustee, for a relation.§

The consideration of this conveyance is the foundation of it. The words *covenant to stand seised*, are not, therefore, absolutely necessary to its operation. A conveyance in form of, and void as a grant, feoffment, or release, may still take effect as a covenant to stand seised.||

This conveyance has the same effect and force as a common deed of bargain and sale, the great distinction being the difference in consideration, that of the former always being founded on consideration of blood or marriage. It is a principle of law, says Judge Kent, "that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character, so as to give it effect. *Cum quod ago non valet ut ago, valeat quantum valere potest.*" The qualification of this rule is: that the instrument must partake of the essential qualities of the deed assumed; and, therefore, no instrument can operate as a feoffment without livery, either shown or presumed; nor as a grant, unless the subject lies in grant; nor as a covenant to stand seised, without the consideration of blood or

* *Carlisle v. Gaskill*, 4 Ind., 219.

† *Bell v. Scammon*, 15 N. Hamp., 381.

‡ *Sanders*, vol. ii., 29.

§ 4 Kent, 493.

|| *Sanders*, vol. ii., 96.

marriage; nor as bargain and sale, without a valuable consideration. If there be no lease to make the deed good as a release, and no delivery to make it good as a feoffment, it may operate as a bargain and sale; or if the release cannot operate because it attempts to convey a freehold *in futuro*, it will be available as a covenant to stand seised, provided there be the requisite consideration.*

We will give an illustration of these principles in two cases, one from North Carolina, the other from the State of New Hampshire. In the case of *Springs v. Hawks*, 5 Iredell's Law, 30, the following was the deed upon which the claimant sought to recover in an action of ejectment:

"State of North Carolina, }
Lincoln County. }

"Friday, the 14th March, 1831.

"This day I, Adam A. Springs, have given unto Elizabeth Hawks, the daughter of Thomas Hawks, of this county, during her natural life, and at her death to her two children, Lewis J. Bertrand and Parmelia, and their heirs and assigns, forever, a certain tract or parcel of land (described), which said land I hereby warrant and defend to the said Elizabeth Hawks and her two children, above-mentioned, according to the tenor above, against all manner of claims, except my own during my natural life, after which the warranty is hereby confirmed forever.

(Signed and sealed.)

" ——— ———."

The heirs of Adam A. Springs brought ejectment against Elizabeth Hawks for the land, and the defendant of course relied upon the deed; but the court held that it was void for the want of consideration; neither could it operate as a covenant to stand seised for the want of the consideration of blood relation. The court say it would have been competent to have shown the fact that a consideration existed, but such was not attempted, the defendant resting the case upon the argument that at common law a deed was valid between the parties and volunteers holding under them without a consideration. But the court refused to sustain this proposition, and drew the distinction between common-law conveyances and those which operate under the statute of uses. So in this case, as in all cases of bargain and sale, the deed cannot be enforced, even between the parties, if there be no consideration

* 4 Kent, 494; *Davenport v. Wynne*, 6 Ired. Law, 128; *Underwood v. Campbell*, 14 N. Hamp., 393.

expressed or shown. The reason is simple: before the statute of 27 Hen. VIII., the court of equity declared the use or beneficial interest in the party who paid the consideration; then the statute converted the use or beneficial interest into a legal estate; but the legal estate cannot thus result except there first be the use or equitable estate; and the use or equitable estate cannot arise except from a consideration.

Bargain and sale requires a pecuniary consideration, though none be expressed.*

The case in New Hampshire is that of *Underwood v. Campbell*, 14 N. Hamp., 393. It was (as called in that State) a writ of entry to recover the land covered by the following instrument:

"Know all men by these presents that we, James Anderson and Nancy, his wife, and being heirs of the estate of David Campbell, late of Lichfield, deceased, have acquitted, and do by these presents acquit ourselves, our heirs and our assigns, of all our right and title to the estate, both real and personal, that the said David Campbell died possessed of, unto Smith Campbell, son of said deceased, to him and his heirs and assigns forever. In witness whereof we have hereunto set our hands, the 10th day of September, A.D. 1828."

The instrument had no seal.

The court held that the instrument was void:

1. For the want of a seal. 2. For the want of a consideration either declared or shown.

The court say, in that case, that before the statute of uses a bargain and sale could exist and be enforced in parol, but that the statute of enrolment required a *writing sealed and enrolled*. It was held, also, in this case, that it was not valid as an agreement to convey because not under seal as required in that State.

It has been held that a deed, defective for want of a seal, might still avail in equity.†

Marriage a Valuable Consideration.—The importance of marriage as a consideration for all kinds of conveyances will almost entitle it to the designation of a *third kind* of consideration. It is neither money in the abstract sense, nor a relation in blood, but for peculiar reasons the books class this as a *valuable* consideration.

In the very recent case in the Supreme Court of the United

* *Jackson v. Fish*, 10 Johns., 456.

† *Wadsworth v. Wendell*, 5 Johns.

States, *Prewit v. Wilson*, 103 U. S., 22, the court say: "Now marriage is not only a valuable consideration, but, as Coke says, there is no other consideration so much respected in the law. Bishop justly observes that 'marriage is attended and followed by pecuniary consequences, by happiness or misery to the parties, by life to unborn children, by unquiet or repose to the State, by what money ordinarily buys, and by what no money can buy, to an extent which cannot be estimated except by the word infinite. To say, therefore, that it is to be regarded, where it is the inducement to any contract, as a valuable consideration, is to utter the truth, but not the whole truth. And also that marriage is to be ranked among the valuable considerations, yet it is distinguishable from most of these in not being reducible to a value which can be expressed in dollars and cents, while still it is in general terms of the very highest value.'* Such is the purport of and language running through all the decisions, both in England and in this country, with reference to marriage as a consideration for an antenuptial contract."

This case originated in Alabama. The husband, who owned a large quantity of property, as an inducement for the consent of his wife in marriage settled upon her his property. The husband, as it appears, was indebted at the time in an amount in excess of his property, and very soon after the marriage the husband went into bankruptcy. The assignee of the husband claimed the property for the benefit of creditors, alleging that the antenuptial contract was intended to defraud creditors. It appeared that the wife acted in good faith, and knew nothing of any purpose on the part of her (expectant) husband to defeat his creditors; that the settlement was an inducement to the marriage. The court held that although the husband intended to defraud his creditors, yet, if the wife did not participate in this fraud, by having notice of the purpose of her husband, that the settlement was good, and she was protected in the settlement. The consideration being marriage, she stood as though she had paid a full and fair consideration in money, and without notice of the rights of creditors.

The Consideration against Public Policy.—A deed is not valid, and certainly not to be enforced in equity, if the consideration is:

* *Law of Married Women*, §§ 775, 776.

1. *Immoral.* 2. *Illegal.* 3. *Fraudulent.*

It is a rule founded upon the plainest principles of reason and common sense, that a deed or contract will not be enforced which is in aid of what is *unlawful*, and these contracts are equally void whether they are made in violation of a law which is *malum in se* or only *malum prohibitum*.*

As to *fraudulent deeds*, much more will be said in the farther progress of this work. And it may be observed that the question of the *consideration* of the deed is more often raised in the investigations of transactions tainted with fraud than in any other way.

As regards this question courts of law have followed the courts of equity. Because the common-law conveyances required no consideration, such as feoffments, fines, and leases, the fealty and homage incident to those conveyances, and the tenure itself, and the solemnity attending those conveyances, induced the law to raise a consideration. But the necessity for a consideration came from the courts of equity, where it was held necessary to raise a use or trust before the statute of 27 Hen. VIII.; then, when this statute transferred the use to the possession, and the estate was consequently recognized in the courts of law, the courts of law adopted the same idea and held that a consideration was necessary in a deed of bargain and sale, and this is the well-settled law both in England and in the United States.†

It is sufficient if the consideration *exists*, although it may not be expressed in the deed. The mention of the consideration in a deed is to prevent a resulting trust to the bargainor or grantor; and this is only *prima facie* evidence of the amount, and the real transaction can be explained *in parol*.‡

The expression for “divers good considerations” is not sufficient to raise a use, but the real consideration can be averred and proven. It is sufficient to rebut the resultant trust, if the deed purports to be for money or value received, without mentioning the precise sum; the smallest sum will raise the use in behalf of the vendee.

* *Bank of the United States v. Owens*, 2 Peters U. S., 527.

† 4 Kent, 465 (11th ed.).

‡ *Meeker v. Meeker*, 16 Conn., 388; *Stocket v. Holliday*, 9 Md., 480; *Thompson v. Thompson*, 9 Ind., 322; *Bennett v. Solomon*, 6 Cal., 134.

"The consideration has become," says Judge Kent, "a matter of form, in respect to the validity of the deed in the first instance, in a court of law; and, if the deed be brought in question, the consideration may be averred in pleading, and supported by proof." It is most usual, however, for the deed to appear as a receipt for the purchase-money; and such would be the better practice for the deed to recite truthfully the consideration, both in amount and variety.

It is not evidence conclusive against existing creditors that the consideration has been paid; but of course the grantor is estopped from denying that any consideration was paid.

The case of *Goodspeed v. Butler*, 46 Maine, 141, held that the only effect of the usual clause, acknowledging a consideration paid, is to estop the grantor from denying that there was any consideration. For every other purpose it may be explained, varied, or contradicted by parol. No person can take advantage of the fraud in a deed but the party defrauded, and those who have his estate.

The grantor is not estopped to prove that there were other considerations than the one mentioned.* The following authorities sustain the proposition that parol evidence is competent to vary the consideration.†

If *one* consideration is mentioned and *others*, then another consideration may be proven by parol, but not otherwise. As, for instance, if the consideration said for *love and affection*, parol evidence is not competent to show a *valuable* consideration.‡

In England it is well settled that *assumpsit* might be brought for the purchase-money, although the deed recited "the receipt whereof."

The effect is to prevent a resultant trust to bargainor, and to forever estop him to deny the use therein mentioned. Although under hand and seal, it is only considered a "receipt," which may always be explained. In the case of *Belden v. Seymore* the consideration was alleged \$1800, while the proof (parol) was admitted to show \$2500. It occurs generally in cases where the

* *Emmons v. Littlefield*, 13 Maine, 233.

† 14 Johns., 210; 16 Wendell, 460; 17 Mass., 240; *Smith v. Battams*, 40 Eng. L. and E., 507; 4 Kent, 465.

‡ *Starkie Ev.*, vol. iii., 124; *Belden v. Seymore*, 8 Conn., 304.

"consideration is alone in controversy," either as to amount or payment.*

What Passes by the Deed.—It was at one time held by some of the authorities that, upon a conveyance of land and delivery of possession, the growing crop did not go with the land, being deemed personal property, but this is opposed by the weight of authority. And whatever is attached to the soil, whether grain growing or what else, is carried with the conveyance, without the exception or reservation is made by the vendor; and I apprehend the same rule applies to execution sales, and sales under decrees of a court of chancery.

It was held in Pennsylvania that, where the deed contained no reservation of the growing crop to the grantor, such reservation or exception could not be shown by parol.† But there are other cases to the contrary, and no good reason appears why parol proof should not be heard if it is competent to explain the *consideration* of a deed. This negotiation in parol, by which the growing crop is excepted, seems to be intimately connected with the consideration of the deed. If the crop be worth two hundred dollars, for instance, and this was excepted, it looks like the vendor took that sum less for his land, and therefore it explains and varies the consideration of the deed. Neither should the vendor take advantage of his own agreement to except the crop. Nor is it an attempt to change a written obligation or deed,—the deed has its full force and effect, and the parol testimony is rather to rebut a presumption of law which attaches to the deed,—which, in truth, has no declaration of the fact either way.

Other things pass by the deed to land as incidents appendant or appurtenant thereto; as a right of way, or other easement appurtenant to land; or, if the owner of a mill and dam, and certain lands overflowed by the dam, sells the mill, with all its privileges and appurtenances, the purchaser may continue the dam with the same head of water.‡

* As to parol evidence to show consideration, see *Belden v. Seymore*, *supra*; *Shepherd v. Little*, 14 Johns., 210; *Morse v. Shattuck*, 4 N. Y., 229; *Bowen v. Bell*, 20 Johns., 338; *Sherwood v. Smith*, 5 Conn., 113; *Webb v. Peele*, 7 Pick., 247.

† *Backenstross v. Stahler*, 33 Penna. Stat., 514.

‡ See 4 Kent, 467, and notes on this point.

Reservation and Exception.—A *reservation* is where the grantor or bargainor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before.

An *exception* is always a part of the thing granted, and is repugnant to the deed, and void, if the exception be as large as the grant itself. If a part specifically conveyed is excepted, the exception is void, as if the conveyance is for two acres, with an exception of one of them. If the granting part of the deed is in general terms, as a grant of a piece of land, excepting the trees or woods, the exception is valid. Of course, if the exception be valid, the thing excepted remains with the vendor, as though no grant had been made.

It is said that a *reservation* must be made in favor of the grantor, and cannot be made to a stranger.*

What is said in another place, in regard to the exceptions contained in a grant or patent, applies equally to deeds of bargain and sale.

Chemperty and Maintenance.—It was the general rule at common law, and a subject of statute also in several of the States, that a conveyance of land by a person against whom it was adversely held at the time of making it, is void, and the reason of the rule, according to ancient authority, is, "for avoiding of maintenance, suppression of right, and stirring up of suits; and, therefore, nothing in action, entry, or re-entry, can be granted over; for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession."†

The old English statutes prescribed that no one should buy or sell unless the vendor had been in possession of the land or received the rents and profits for the same during the year previous. Some of these statutes were highly penal, and made the violation of the same a forfeiture of the land to the king and the prosecutor.‡

But, if the deed is made in pursuance of a contract existing before the adverse possession, the deed is not subject to the rule, but is valid.§

* *Ives v. Van Auken*, 34 Barb. (N. Y.), 566.

† *Tyler, Eject.*, 936.

‡ *Coke on Litt.*, 214, a.

§ *Tyler, Eject.*

And this principle does not apply to conveyances made for the people or State, nor to deeds made by guardians, executors, and administrators acting under a decree of court; nor to persons acting alone through public authority; nor to a sheriff who makes a deed by virtue of statutory authority founded on judgment and execution; in these cases it is not necessary to recover possession before the deed is made.*

Some of the States have made an exception, in cases of mortgages, by statute.†

The possessions of Indians, existing as an independent nation, is not such adverse possession as will render void a deed by patentees of lands granted to them by the State.‡

This adverse possession which will make a deed void for champerty must be under a title adverse to that of the grantor of the deed, and must be clearly made by positive facts, and not left to conjecture. It has been held that the possession of the debtor, after the sale under execution, is not adverse to that of the sheriff's vendee.§ So that, if the party in possession is under any estoppel to deny title of the grantor of the deed, the possession does not affect the same. The courts of New York have held that the adverse possession, to make the deed void, must be under claim of some specific title; that a mere general ownership, irrespective of particular title, is insufficient.|| The title may be good or bad, but there at least must be color of title opposed to the title of the grantor.

It should be observed that a deed said to be void for champerty is not absolutely void for all purposes; the deed is valid between the parties and as to all the world, except the person holding adversely, and those coming in under him. The title must remain in some one, and if the title does not pass to the bargainee, on account of the adverse possession, the title remains in the bargainor. Therefore, in an action to recover the land, the vendee can use the name of the vendor upon which to recover,

* *Hanna v. Renfro*, 32 Miss. R., 130; *Hoyt v. Thompson*, 5 N. Y. R., 320; *Ward v. Bartholomew*, 6 Pick., 409; *The People v. Mayor of New York*, 28 Barb., 240.

† See authorities, *Tyler, Eject.*, 945; 4 Kent Com., 447.

‡ *Jackson v. Hudson*, 3 Johns., 375.

§ *Mitchell v. Sipe*, 8 Yerger, 179; *Cook v. Travis*, 20 N. Y., 400.

|| *Tyler, Eject.*, 940.

and which recovery inures to the benefit of the vendee.* For full information on the doctrine of champertous deeds the reader is referred to 4 Kent, 446, and subsequent pages, with complete notes.

The doctrine of champerty, as applied to deeds, is not of great practical importance in the United States, as the name of the vendor could always be used to protect the vendee, and it is the relic of an ancient policy not precisely adapted to this country. Hence some of the legislatures have abolished the doctrine altogether. North Carolina did so in 1874-5, after many rigid decisions in favor of the doctrine. In other cases, the courts have construed the doctrine very strictly; for instance, in New York a party occupied one hundred and thirty acres, having title for only one hundred acres, but the party supposed the entire tract occupied by him to contain only one hundred acres; and the court held that the possession of the thirty acres was not so adverse as to render champertous a grant thereof by the true owner, although the rule was conceded to be otherwise in respect to an adverse possession under the statute of limitations.† Judge Selden, who delivered the opinion, said: "No reason exists for giving to the champerty act a liberal or enlarged construction; it is the relic of an ancient policy, which has been treated with but little favor either with the legislatures or courts in modern times, and should not receive such a construction as will make a serious obstacle to the transfer of undisputed titles," etc.

Other Requisites of a Deed.—At common law it was not necessary that the deed be signed. It was only required that the instrument be sealed and delivered.

But in this country generally a deed is not effectual except signed, as well as sealed and delivered. The deed must be sealed, or it must have something upon it answering to a seal, which is generally regulated by statute. As to what will answer for a seal for a deed, the rule is by no means uniform. Sometimes an adhesive substance is applied to the paper or other material on which the contract is written; sometimes an *impression* of a seal upon the material is all that is required; and sometimes

* *Hamilton v. Wright*, 37 N. Y., 502; *Wilson v. Nance*, 11 Humphreys, 191; *Edwards v. Parkhurst*, 21 Vermont R., 472.

† *Crary v. Goodman*, 22 N. Y. R., 170, 177.

a scroll with a pen is made sufficient.* It may also be added that the claimant must always have such a deed as fills the requirements of the statute or law of the locality where the action is triable.

A *copy* of the deed is evidence if the original has been registered. The probate and acknowledgment of the deed and the certified copy are all evidenced by the proper officer for these purposes; and their official character appearing, the court will presume them valid *prima facie*. If the deed has no such certificate, the plaintiff must prove the execution of the deed by the subscribing witness, if he can be produced; if not, the deed may be proved in the manner as other writings of a private nature may be proved in similar circumstances.†

If, when the deed is produced, it appears to have been *altered*, or there are any grounds of suspicion manifest upon its face, the party producing the deed must explain its appearance. However, the general rule is, that if nothing appears to the contrary, the alteration will be presumed to have been made at the time the deed was executed.‡

The deed takes effect only from its delivery,§ and may be delivered to the party or to any other person authorized by him to receive it. There may be a conditional delivery, called *escrow*, which means a delivery to a stranger, to be kept until certain conditions be performed, and then delivered to the grantee.||

A Defeasance.—A defeasance by which to defeat a deed must be *by deed*. If the provision for the defeat of the deed is contained in the deed itself, this is called a *condition*; if *afterwards*, it is called a defeasance.

In the case of *Linker v. Long*¶ it appeared that one W. F. Taylor had conveyed the land to Isaac S. Linker, the plaintiff,

* Tyler, Eject., 540.

† Tyler, Eject., 541.

‡ See cases cited, Tyler, Eject., 541.

§ See *United States v. Le Baron*, 19 How. U. S. Rep., 73, where Mr. Justice Curtis refers to the English cases cited, showing that a deed takes effect from the delivery, and not from the date.

|| 4 Kent's Com., 454 and notes.

¶ *Linker v. Long*, 64 N. C., 295. The cancellation, surrender, or destruction of a deed of conveyance will divert the estate which passed by force of it. 1 Johns. Ch. Rep., 417; 2 Johns. Rep., 87. For meaning of *defeasance*, see Bouv. L. D., 387.

on the 6th November, 1852, and this deed was offered in evidence in the action of ejectment to show title in himself. The deed was objected to, because it appeared that the deed had been redelivered by Linker to Taylor, May 11th, 1853, with the indorsement, signed by Linker, "I transfer the within deed to W. F. Taylor again." And it appeared that Taylor went into the possession and remained until action was brought, in 1860.

The court below refused to allow the deed to be read, upon the ground that this written indorsement on the deed, without seal, defeated the deed. On appeal it was held as error.

Says the court, C. J. Pearson: "By force of the deed and the operation of the statute 27 Henry VIII. an estate of *freehold and inheritance* was vested in Linker on the 6th day of November, 1852. The question is, has that estate been divested by any conveyance or means known to the law? Suppose the deed, on 11th May, 1853, had been cancelled, torn up, or burnt, by consent of both parties, the estate would not have been thereby revested in Taylor, for, by the common law, a freehold estate in land can only pass by livery of seisin, under the statute of enrolments, by 'deed of bargain and sale indented and enrolled,' and under the Act of 1715, by 'deed duly registered;' so the freehold having passed to Linker, could only be passed from him, either to a third person or to Taylor, by some kind of conveyance known to the law. A will, being ambulatory, may be revoked by cancellation; a covenant or agreement, being *in fieri*, a thing to be done, by cancellation or by deed of defeasance, which may be executed after the covenant. But a conveyance of a freehold estate of inheritance, being *a thing done*, cannot be *undone* by cancellation, or any other mode, and the estate can only be revested by another conveyance, unless a condition or deed of defeasance, executed *at the same time* and as a part of the conveyance to be annexed to the estate, giving to it the qualification by which it may be defeated."

The court takes a mortgage as an illustration of a conveyance on condition. If the money be paid at the time fixed the estate is revested in the mortgagor, but if the condition be not performed by payment at the day, the estate becomes absolute, and although the money be paid and accepted afterwards, the estate can only be revested by another conveyance. The court, how-

ever, suggested that the indorsement would furnish evidence of an agreement to reconvey, which might be enforced in equity. But this suit having been brought prior to the new Procedure of 1868, was governed by the practice existing at the time, referring to *Gaither v. Gibson*.^{*} Under the code, as now in existence, this equitable application for specific performance can be made in the action to recover land. It is obvious that no mere *parol* defeasance could affect the title, nor could estoppel *in pais* operate as a reinvestiture of the title.[†]

Spoken words will not by estoppel establish a title to land, in the absence of the formal conveyances required by the statute of frauds, unless in cases of doubtful or disputed claims, and cases where the facts are not of record and not readily accessible."[‡]

How a Deed may be Disregarded on Account of Fraud in a Court of Law.—In the trial of ejectment in which is involved the *legal* title, the fraud can only be inquired into which goes to the extent of showing *whether or not a deed ever existed*, as where it was misread to the party, or imposition or fraud of some kind in procuring the signature and seal.[§] It is true that fraud vitiates all contracts in a general sense; but it must be reached in some authoritative mode, and this may depend upon the forum in which it is presented, and also upon the parties to the litigation. "So in the States where the two systems prevail, of equity and law, a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in suits upon sealed instruments, but turns the party over to a court of equity, where such instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no

^{*} *Gaither v. Gibson*, 63 N. C., 93.

[†] In Virginia a recent decision holds that ejectment cannot be grounded on an equitable title, or on an estoppel *in pais*. *Suttle v. Richmond, Fredericksburg and Potomac R. R. Co.* See Court of Virginia Appeals Rep., July 19th, 1882.

[‡] *Shaw v. Chambers*, Sup. Ct. Mich., Northwestern Reporter, June 17th, 1882.

[§] *Hartshorne et al. v. Day*, 19 How., U. S., 211; 2 John. Ch., 177; 5 Cow., 506; 4 Wend., 471; 6 Munf., 358; 2 Rand., 426; 1 Ala., 100; 7 Mo., 424; 4 Dev. & B. (N. C.), 436.

middle course; the question is limited to the validity or invalidity of the deed."*

Courts of law and equity have concurrent jurisdiction in setting aside a deed for real estate made to hinder, delay, and defraud creditors, and a purchaser upon execution has the same right in this respect as a judgment creditor.† But this is by virtue of the statutes of 13th and 27th Elizabeth, and those of a similar character in the American States, the effect of which is to make the deed absolutely *void* in law on it appearing that it was executed to hinder, delay, or defraud creditors. Under this rule the judgment creditor, finding that his debtor has thus made a fraudulent conveyance, can ignore the deed and sue out execution, procure sale, take sheriff's deed, and bring an action of ejectment against the fraudulent vendee and show the fraud on the trial of the title. The fraud vitiates the deed, therefore the title never passed out of the debtor, so that the sheriff's deed passes the title when the fraud is shown.

But a difficulty in practice may occur sometimes in the States where the jurisdiction of law and equity is blended in the same court and all distinctions in the form of actions are abolished in regard to *pleading* in questions of fraud. In those cases where the court of law took notice of the fraud, that is, such as has been shown, showing that *no deed ever existed*, this allegation need not appear in the pleadings.

But suppose the fraud consists in the consideration and the circumstances out of which the consideration arises, the party against whom this charge is made should have notice in the pleadings of the imputed fraud. So if the party can assert his equitable rights in the same suit in which he claims the legal title, he should in the complaint or petition charge the fraud. In this case the pleadings necessarily assume substantially the shape of a bill in equity. In a case of this kind, where no allegation of fraud is made, no proof can be heard on the trial, for the party

* Opinion of Mr. Justice Nelson in *Hartshorne et al. v. Day*.

A deed executed by a *lunatic* is *voidable* and not *void*, *Riggin v. Green*, 80 N. C., 237; see 2 Blackstone Com., 295; 2 Kent, 451; 1 Story's Eq., §§ 227, 228; 1 Dev. & Bat. Eq., 344; 5 Ire. Eq., 167. Same rule applies to *infants* and persons under *duress*.

† *Onendorf v. Budlong*, U. S. Cir. Ct. East. Dist. Mich., in the Federal Reporter, 20 June, 1882.

sued must have notice of what he is called upon to answer. And it is presumed that no blending of law and equity will of itself destroy this rule, that *proof* without *allegation* is a nullity: "a plain concise statement of facts constituting a cause of action" must be made, notwithstanding the abolition of all forms of pleading as they existed under the old system.* It is true C. J. Pearson, in *Jones v. Cohen*,† says that "in ejectment any deed produced as a link in the chain of title may be attacked and invalidated by showing incapacity in the maker, and this without any record specification of the nature of the obligation."

In this case it was allowed to impeach the probate of an infant feme covert, contrary, however, to former decisions in that State. The Act of 1751 had provided that the acknowledgment and privy examination had the effect to pass title as a matter of record, being equivalent to a fine and recovery, and being held as a judicial act it could not be impeached collaterally. But the court held that the Revised Code‡ had changed the old law, so that the privy examination of an infant feme covert may be attacked collaterally as the law now stands in North Carolina.

Parol Evidence Employed to Show that a Deed Absolute is Simply a Mortgage.—The use of parol evidence in this class of cases is upon the idea of establishing a *trust*. And this trust is in the nature of *constructive* trust growing out of fraud. The holder of the *legal* title who holds through *fraud* is said to hold as *trustee* by *construction* of law. Upon this question of showing a *parol* defeasance to a deed, the authorities, both in England and America, are divided somewhat.

This difficulty arises mostly in consequence of the statute of frauds. Lord Hardwicke§ is said to have laid down the rule that where there is no fraud or mistake in the original transaction, and the word or promise of the defendant was relied on, the statute declares such contract void, and equity will not interfere.

The Supreme Court of Massachusetts held to the same doctrine

* See as to this point *Young v. Greenlee and wife*, 82 N. C., 346.

† *Jones v. Cohen*, 82 N. C., 75. But this is upon the idea that the deed is *void*, and therefore no deed. The authorities hold an infant's deed only *voidable*. There is no reason why a plaintiff should not recover in ejectment on a *voidable* deed.

‡ Ch. 37, sec. 8.

§ *Montacute v. Maxwell*, 1 P. Williams, 618.

in *Walker v. Locke*.^{*} But this case was decided before Massachusetts had chancery jurisdiction conferred upon her courts in matters of trust and fraud. For this reason Justice McLean refused to recognize the case as binding authority in the case of *Babcock v. Wyman*,[†] which was from the District of Massachusetts.

There is, besides the statute of frauds, a rule of law which is often adverted to in this class of cases, namely, that where there is a *written contract*, all antecedent propositions, negotiations, and *parol* interlocutions on the same subject are deemed to be merged in such contract, and that there must be fraud or mistake in making the agreement before it can be reformed. Let us observe the real point of difference in the authorities. In the first place, it is universally conceded that *parol* evidence is competent to reform a deed where *fraud, mistake, imposition, or oppression* can be shown. This was recognized by Lord Hardwicke in the case cited, even since the passage of the statute of frauds. But take the case of a deed in fee made in that form without conditions, and the parties thereto *at the time* made *parol* agreement that the deed was to be considered as a mortgage; here is no fraud at the time; the parties accept this mode of contract, with a knowledge of the statute of frauds; the word of one party is relied on. Now, the party in whom this confidence was placed *orally*, refuses, in subsequent time, to recognize the obligation, and stands upon the statute of frauds. What is the law in a case of this kind? In New York it is held that, although the statute does not forbid *parol* proof to establish a resultant trust,[‡] yet, that where the deed is *absolute*, *parol* evidence is only admissible where fraud or mistake is shown.[§] But then it is held that *parol* is admissible to show a *security*.^{||}

In North Carolina[¶] it was held that *parol* evidence was competent to show a deed absolute was in fact a mortgage. But, in

^{*} *Walker v. Locke*, 5 Cush., 90.

[†] *Babcock v. Wyman*, 19 How. U. S., 239 (1856).

[‡] *Abbott, Trial Ev.*, 238, citing *Swineburne v. Swineburne*, 28 N. Y., 568.

[§] *St. John v. Benedict*, 6 John. Ch., 111; *Sturtevant v. Sturtevant*, 20 N. Y., 39.

^{||} *Horn v. Keteltas*, 46 N. Y., 605.

[¶] *Streates v. Jones*, 1 Murph., 449; *S. P. Jackson v. Blount*, 2 D. & B., Eq. 555.

Whitfield v. Cates,* the court uses rather strong language, saying, in substance, that to declare a deed absolute as a mortgage, the party must allege fraud, imposition, oppression, or mistake. Perhaps, the *precise* case as here stated has not been passed upon in that State, that is where the deed is in fee in that form, and the parties agree at the time that it is intended as a security for money; the full power exercised by the courts in that State on *trusts* would seem to authorize the enforcement of the rights of the parties in the case stated.† But the weight of authority, including repeated adjudications of the Supreme Court of the United States, is in favor of the admissibility of the *parol* evidence in the case stated. In Edrington v. Harper,‡ it was held: "The fact that the real transaction between the parties was a borrowing and lending, will, whenever or however it may appear, show that a deed, absolute on its face, was intended to be security for money, is only a mortgage, however artfully it may be disguised."

In Jenkins v. Eldridge (3 Story's Rep., 293), Mr. Justice Story said: "In 4 Kent, 143 (5th ed.), it is declared, 'a deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage between the parties if it was intended by them to be merely a security for a debt.' And this would be the case though the defeasance was only by an agreement resting in *parol*, for *parol* evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted by fraud or mistake."

This is a quotation from Kent; in another case, Judge Story§ said: "It is the same, if it be omitted by design, upon mutual confidence between the parties; for the violation of such agreement would be a fraud of the most flagrant kind, originating in an open breach of trust against conscience and justice."

In Tennessee,|| in Overton v. Bigelow, it was said, "that an absolute bill of sale of negroes may be converted into a mortgage by a *parol* agreement to allow the conveyer to redeem, and

* Whitfield v. Cates, 6 Jones, Eq., 136.

† See as to trust, Foy v. Foy, 2 Hay., 141.

‡ Edrington v. Harper, 3 J. J. Marshall, 355.

§ 2 Sumner's Rep., 228, 232-3.

|| Overton v. Bigelow, 3 Yer., 513.

this agreement may be inferred from the price given and the mode of dealing between the parties."

In the Supreme Court of the United States,* it was held that "to insist on what was really a mortgage as a sale is, in equity, a fraud." In *Conway v. Alexander*,† Chief Justice Marshall says: "Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it was a sale or mortgage."

But, in *Babcock v. Wyman*,‡ the point was directly decided that *parol* evidence was competent to declare the deed for land, absolute on its face, a mortgage, simply on the failure of the party to carry out an *oral agreement* at the time. And no other allegation of fraud was held necessary, only this failure to carry out this understanding between the parties. And to sustain this view, Justice McLean cited the authorities already noticed, and also.§ These cases are founded on the assumption that the admission of such evidence is necessary for the prevention of fraud. If it be a *fraud* for a party who takes a deed absolute, with a *parol* agreement that it is a mortgage, and then refuses to recognize the agreement, then it is sufficient to charge these facts; this makes a sufficient allegation of fraud. Of course, many circumstances and facts might be stated in the bill, other than the *parol* agreement, showing fraud or a holding against conscience and justice.

* *Russell v. Southard*, 12 How., 154.

† *Conway v. Alexander*, 7 Cranch, 238.

‡ *Babcock v. Wyman*, 19 How., 289.

§ *Morris v. Nixon*, 1 How., U. S., 126; *Podmore v. Gunning*, 7 Simmons, 644; *Lloyd v. Spillote*, 2 Ark. Rep., 150; *Ross v. Newell*, 1 Wash. Rep., 14; *Watkins v. Stocket*, 6 Har. & Johnson, 435; *Strong v. Stewart*, 4 John. Ch. Rep., 167; *English v. Lane*, 1 Porter, Ala. Rep., 318; *Boyd v. McLean*, 1 John. Ch., 582; 1 Sumner, 187; *King v. Newman*, 2 Mumf., 40; *Dunham v. Dey*, 15 John. R., 555; *Walton v. Cronly's Admr.*, 14 Wend., 63; *Van Buren v. Olmstead*, 5 Paige, 9.

CHAPTER VII.

PRESUMPTIONS OF LAW—GRANTS AND DEEDS PRESUMED TO EXIST FROM LAPSE OF TIME.

INTIMATELY connected with the subject of limitations is that of the presumptions of law, founded upon long possession of real property.

As a general rule, the statutes of limitation do not apply to the State or government, except expressly so provided. The ancient maxim of the common law, *nullum tempus occurrit regi*, applies in this country in its application to the State or to the United States.* But, in many of these statutes, the government or State is expressly bound by certain limitations. Thus the statute of 21 James I., c. 5, provided that a quiet and uninterrupted possession of sixty years should bar the crown; and several of the States have provided a limitation against the State; thus the Act of 1791, in North Carolina, would presume a grant from the State after twenty-one years of continuous adverse possession under "known and visible boundaries" (covered by a color of title) for that period. Other States have applied the statute to the State, as in Tennessee and New York.† But the common-law doctrine of presumptions is a different thing from the statute of limitations, and title is *presumed* to be out of the State very frequently after a long and uninterrupted possession.

Mr. Greenleaf says: "*Presumptions of law* consist of those rules which, in certain cases, either forbid or dispense with any ulterior inquiry. They are founded either upon the first principles of justice or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things." Presumptions of this kind are called *conclusive* or imperative, or absolute presumptions of law.

* *United States v. Hoar*, 2 Mason (Cir. Co. Rep.), 312; 1 Greenl. Ev., § 36.

† See Angell, Lim. (Appendix); Statutes Lim. of the Several States. Note.—Neither does the doctrine of estoppel apply to the State or government. The State may issue a grant and afterwards show the fact that no title passed; and this freedom from estoppel extends to the purchaser or grantee from the State. *Taylor v. Shuford*, 4 Hawk., 132; *Candler v. Lunsford*, 4 Dev. & Bat., 407.

And they are defined as "rules determining the quantity of evidence requisite for the support of any particular averment which is not permitted to be overcome by any proof that the fact is otherwise."*

There are what is called *disputable* presumptions, which are founded on the same reasons of public policy; but the connection in this class is considered not so intimate, nor so nearly universal, as to render it expedient that it should be absolutely and imperatively presumed to exist in every case.† For instance, thirty years' possession of lands may constitute a presumption of *law* that the State had made a grant; yet a shorter period when coupled with other circumstances, indicative of ownership, may justify a jury in finding a grant.‡ These instances, perhaps, come under the presumption of *facts*, rather than the presumption of *law*.

It will be observed that the elementary writers treat the terms, "*limitation*" and "*prescription*," as very much the same; but, *strictly* speaking, the term, "*prescription*" applies to *incorporeal* rights; and the long, honest, and uninterrupted possession creates a *presumption of law* which cannot be rebutted. Now, applying long lapse of time—say thirty years—to the possession of vacant lands, in analogy to "*prescription*," the jury are instructed to *presume* a grant, if nothing more appears. This seems to be the effect of the doctrine of the cases cited in this chapter on this question. In other words, the presumption of *law*, that a grant has issued is a *rebuttable* presumption, being applied to *corporeal* rights. The *test* of when a cause of action accrues is the time of the accruing of the cause of action *against a wrong-doer or trespasser*, and not in whose behoof and benefit the suit is prosecuted. Therefore, if the State permit an uninterrupted possession of thirty years, and *then* issue a grant, the grantee is bound by the

* 1 Greenl. Ev., §§ 14, 15.

† 1 Greenl. Ev., §§ 33, 34.

‡ 1 Greenl. Ev., § 17 (note); Wallace v. Maxwell, 10 Ire. (N. C.), 110; Fitzgerald v. Norman, N. C. T. R., 131; Candler v. Lunsford, 4 Dev. & Bat., 407; Jackson v. McCall, 10 Johns., 377; 1 Greenl. Ev., § 45. As to the English doctrine on this point see Roe v. Ireland, 11 East, 280; Read v. Brookman, 3 T. R., 159; 2 Starkie Ev., 672. See, as to kind of evidence for the jury, Douglass v. Mitchell, 35 Penna., 440.

lapse of time, and cannot claim that a *new* cause of action exists as to him. See *Freeman v. Sprague*, cited in the note.*

Juries are often advised, under the common-law practice, to presume conveyances between private individuals in favor of a party who has proved a right to the beneficial enjoyment of the property, and whose possession is consistent with the existence of such conveyance as is to be presumed.

C. J. Tindal, in *Doe v. Cooke*,† confines this doctrine to cases where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter necessary to make it complete in form. This is done in order to prevent an apparently just title from being defeated by matter of mere form. Thus Lord Kenyon said that in all cases where trustees ought to convey to the beneficial owner, he would leave it to be presumed under reasonable circumstances that they had conveyed accordingly.‡ And says Mr. Greenleaf: "The same presumption has been advised in regard to the reconveyance of mortgages, conveyances from old to new trustees, mesne assignment of leases, and any other species of documentary evidence and acts *in pais* which are necessary for the support of a title in all other respects evidently just. It is sufficient that the party who asks for the aid of the presumption has proved a title to the beneficial ownership, and a long possession not inconsistent therewith, and has made it not unreasonable to believe that the deed of conveyance, or other act essential to the title, was duly executed. But where these merits are wanting the jury are not advised to make the presumption."§

* It has been held in North Carolina that, neither under the old practice nor the *new* code practice, is it necessary to plead specially the *lapse of time* necessary to create a grant, nor the statute of limitations in an action to recover land, when the defendant denies title in the plaintiff. *Freeman v. Sprague*, 82 N. C., 366; citing *Davis v. McArthur*, 78 N. C., 347; *Call v. Ellis*, 10 Ire., 250. The reason is, the period of possession and the statute confer title, and therefore it appears *out of the plaintiff*.

† *Doe v. Cooke*, 6 Bing., 174.

‡ *Doe v. Lybourn*, 7 T. R., 2; *Doe v. Staples*, 2 T. R., 696.

§ 1 Greenl. Ev., § 46 (note 2). The cases referred to in this note to Greenleaf fix different periods for such a presumption; thus, fifty-two years, *Ryder v. Hathaway*, 21 Pick., 298; fifty years, 16 Pick., 137; thirty years, *McNair v. Hunt*, 5 Miss., 300; twenty years, *Brattle Square Church v. Bullon*, 2 Met., 363. All the circumstances are taken in connection with the lapse of time for the consideration of the jury.

It is presumed that much of this doctrine is now obsolete in many of the States in consequence of the statutes of limitation and the doctrine of color of title. As many of these informal and defective conveyances become color of title, and holding the possession under the same for the period limited confers the title by virtue of the statute, and hence no question for the jury except as to the character of the possession.

But to return to the question of the existence of a grant from the State by presumption of law, founded upon long possession.

It seems that in England a possession of sixty years or more is necessary to presume a grant to land. But in this country the time is generally fixed at a shorter period. In North Carolina this doctrine has undergone a very thorough discussion both as to the time necessary to raise the presumption and as to the character of the possession. The earlier cases in this State required sixty years, but by successive decisions it has been reduced to fifty, forty, thirty, and an intimation that it might be supported by twenty-five years.*

The Character of the Possession Required to Raise the Presumption of Grant.—In a statute of limitation the requirements of the statute must be complied with, such as having color of title, uninterrupted possession, privity among tenants, etc., but the common-law presumption is founded upon a combination of circumstances, not arbitrarily fixed by statute.

In the case of *Reed v. Earnhart*, Judge Pearson, who delivered the opinion of the court, and C. J. Ruffin, who delivered a dissenting opinion, took quite a tilt at the position of each other. The majority of the court held that a *continuous and unceasing* possession is not necessary to raise the presumption of a grant, and that it was not necessary to show *privity* among the tenants.

As it was held that the presumption of a grant from long possession is not based upon the idea that one actually issued, but because public policy and "the quieting of titles make it necessary to act upon that presumption," the presumption can only be repelled by proof of the fact that the State never did part with its title. The case showed that A., B., C., and D. had had possession of a tract of land for upwards of forty years under suc-

* *Reed v. Earnhart*, 10 Ired., 516; see also 2 Sneed (Tenn.), 211; 3 Head, 301.

cessive conveyances from A. to B., from B. to C., and from C. to D., with the exception of five years between the twentieth and twenty-fifth years, during which period no possession was proved. The great point of difference between the majority of the court, to wit, Pearson and Nash, and Ruffin, who dissented, was this "break" in the possession for the five years. In the argument to sustain the view that so the possession was *long* it need not be *connected*, Judge Pearson said: "Long possession affords this reasonable presumption. To require proof of particulars and of detail as to past occurrences would be inconsistent with the necessity which gives rise to the rule, and render its practical application impossible.* For instance, it has been proved that for sixty years a tract of land has been occupied and treated as private property, first by A., then by B., C., and D. This general fact can be proved. But, if before the presumption of title out of the State can be made, it be necessary to go into particulars and show the connection between A., B., C., and D., and how one claimed and derived title from the other, etc., these particular facts cannot be proved. This difficulty of making proof is the foundation of the rule. Hence to require such proof is inconsistent with the reason of the rule, prevents its practical application and renders it illusory and useless in every case where it is most needed." He then cites the cases† in note to sustain the position. He further says: "The necessity of the rule arises from the difficulty of making proof in relation to transactions of a remote date. The loss of papers, death of witnesses, treachery of memory, make it almost impossible to establish with legal pre-

* See the strong case of *Bullard v. Barksdale*, 13 Iredell, N. C.

† *Fitzrandolph v. Norman*, N. C. Term R., 131; *Chandler v. Lundsford*, 4 Dev. & Bat., 407. That thirty years' possession will presume a grant from the State, see *Wallace v. Maxwell*, 10 Ire., 110; *Davis v. McArthur*, 78 N. C., 357; *Simpson v. Hyatt*, 1 Jones, 517; *Callen v. Sherman*, 5 Ire., 711. But it is held in the State of North Carolina that this is not an imperative or conclusive presumption of law. It is said: "It is not merely a presumption of fact which a jury may make, nor is it a presumption of law which cannot be rebutted; but it is a presumption which the law requires, and the court should direct the jury to make, unless proof is offered which shows the fact to be otherwise."

Theoretically it is a *rebuttable* presumption of facts, but practically a positive presumption of law. *Rogers v. Mabe*, 4 Dev., 180.

cision the existence of facts which occurred many years ago. Reasonable presumption must therefore be acted on.”*

Judge Ruffin, in the dissenting argument, conceded that thirty years’ possession was sufficient to raise the presumption of a grant, but argued that in all the cases hitherto there had been thirty years’ *continuous* possession, and insisted that the chasm of five years destroyed the continuity of the possession, and therefore not sufficient to raise the presumption of a grant. He considered *quida, longa, et pacifica possessio* as the best evidence of title. He said possession short of thirty years, with other facts and circumstances, may very properly be weighed by a jury as evidence that a deed was formerly made; but if it be less than thirty years it fails to establish, by presumption in law, the existence of the grant alleged, that upon a *cesser*, the possession, being vacant, vests in the State by implication. He also likened it to the statute of limitations barring the entries of individuals and the State. Judge Ruffin also argued that the language of all the cases used the expressions “uniform” possession, “long-continued possession,” “ancient and continual,” etc.† This diversity of opinion from two of the most thorough and distinguished judges who ever lived in the State is well calculated to throw the question in doubt, but at present the majority opinion in *Reed v. Earnhart* is recognized as the rule in this State. In this State now, by the later act, thirty years bars the State. It is therefore a statute of limitation,‡ and the Act of 1791 is substantially re-enacted.

As a further qualification of this thirty years’ possession, it must appear:

1. That the possession is actual and up to “known boundaries.”

* The operation of the statute as to the presumption of a grant arising from possession of land is suspended by the issuing of a grant to another covering the *locus in quo*. *Kitchen v. Wilson*, 80 N. C., 191.

† To sustain the dissenting opinion Judge Ruffin relied on the following cases: *Hawks v. Tucker*, 2 Hay, 147; *Fitzrandolph v. Norman*, N. C. T. R., 132; *Rogers v. Mabe*, 4 Dev., 180; *Chandler v. Lunsford*, 4 Dev. & Bat., 407; *Morris v. Commander*, 3 Ire., 500; Lord Coke in *Bedle v. Beard*, 12 Rep., 5. As to the doctrine of a grant by *presumption* see *Bullard v. Barksdale*, 11 Ire., 461; *Simpson v. Hyatt*, 1 Jones, 517; *Baker v. McDonald*, 2 Jones, 244; *Hurley v. Mongan*, 1 Dev. & Bat., 426.

‡ *Battle's Revisal*, ch. 17-18, sub sec., 1-2.

2. The occupation must be such as is consistent with the usages of agriculture, such as cultivating the land, clearing new and turning out old fields, and cutting timber promiscuously.* In the case of *Wallace v. Maxwell* the defendant relied on thirty years as a presumption of a grant. And the following facts as to "known boundary," "that one Black cultivated a part of the land in controversy, thirty or thirty-five years ago, and claimed the whole up to the boundary lines of the plaintiff's grant for forty years, and cut timber from different parts of the premises during that time, and that the boundaries were well known in the neighborhood, and Black's claim, under which the defendant claimed, was public and notorious. One of the cleared fields has been turned out, and is now an old field, and had not been cultivated fourteen or fifteen years before bringing the action."

Other Presumptions of Law.—*Estoppels* are ranked by Mr. Greenleaf in the class of imperative conclusions of law, who says: "A man is said to be estopped when he has done some act which the policy of the law will not permit him to gainsay or deny."† Thus, in the recital of facts in a deed there is generally a conclusive presumption of law that the same are so as therein recited. The doctrine of estoppel is guarded with great strictness. "Hence, estoppels must be certain to every intent, for no one shall be denied setting up the truth, unless it is in plain and clear contradiction to his former allegations and acts."‡ Generally, all parties to a deed are

* *Wallace v. Maxwell*, 10 Ire., 110. As to the evidence to show boundary and character of possession, see *Doe & Tate v. Southard*, 1 Hawks. (N. C.), referred to in the chapter on Boundary. Most of the rules of evidence which are employed to show *adverse possession* and *boundary* under the statutes of limitation are applicable when the effort is to show a grant by presumption. There must be the required possession, and "metes and bounds" must be established, either by actual occupation or the occupation of a part under a writing called a "color of title." And the discussions under these heads are referred to.

† 1 Greenl. Ev., § 22.

‡ 4 Kent's Com., 261; *Jones v. Sasser*, 1 Dev. & B., 452; *Carver v. Jackson*, 4 Peters, 83; 1 Greenl. Ev., § 22. Estoppels must be mutual, and one who is not bound by estoppel cannot take advantage of it. *Griffin v. Richardson*, 11 Ire., 439; *Gilliam v. Bird*, 8 Ire., 280.

Where A. conveyed land to B. and remained in possession several years adversely after such conveyance, it was held that A. was estopped, and could not set up the limitation of seven years, except he could show color of title from another source. *Johnston v. Farlow*, 13 Ire., 84.

bound by the recitals in the same, including privies in blood, privies in estate, and privies in law. But such recitals do not bind strangers, nor persons claiming under one of the parties by a title anterior to the date of the reciting deed, nor persons claiming by adverse title.*

A grantor is generally estopped from denying that he had title at the date of the grant. And a covenant of warranty estops the grantor from setting up an after-acquired title against the grantee.†

As to whether the grantor is thus estopped by the covenant that he is seised in fee and has a good right to convey, the authorities are not fully agreed. Mr. Greenleaf takes the position that this covenant is not an estoppel, and says that the import of this covenant is, that the grantor is seised, in fact, at the *time of the conveyance*, and thereby qualified to transfer the estate to the grantee.‡ This position is, perhaps, sustained by several Massachusetts cases.§

This estoppel does not apply to a grantor acting officially as a public agent or trustee. A *feme covert* at common law was not estopped by her conveyance from claiming under a title to land subsequently acquired, for the reason that she could not bind herself personally by any covenant.|| But, it is supposed, under the most of the recent Married Women's Acts, the rule is changed.¶ And it has been held that where a party purchased land in his own name for the benefit of another, and conveys to

* *Crane v. Morris*, 6 Peters, 611. See the full exposition of the doctrine of estoppel, by Mr. Justice Story, in *Carver v. Jackson*, 4 Peters, 84; 1 Greenl. Ev., §§ 23, 24, 25 (notes); Bigelow's Estoppel.

† *Turrett v. Taylor*, 9 Cranch, 43; *Jackson v. Wright*, 14 Johns., 183; *McWilliams v. Nisby*, 2 Serg. & Rawle, 515; 3 Pick., 52; *Blanchard v. Ellis*, 1 Gray, 195.

‡ The recital of a former in a subsequent deed is evidence of the existence of the former deed against a party to the latter and all claiming under him, but not against a stranger. *Hoyatt v. Phifer*, 4 Dev. Law, 273.

The whole of the recital is taken, and, therefore, if a paper be recited to be surrendered, and one relies upon the recital as proof of the existence of the patent, it will also be proof of a surrender. *Ibid.*, Com. Digest, Evidence, B. 5.

§ *Marston v. Hobbs*, 2 Mass., 433; 4 Mass., 408; 17 Mass., 213. *Contra*, *Richardson v. Dorr*, 5 Vt. R., 9; *Lockwood v. Sturdevant*, 6 Conn., 373.

|| *Jackson v. Vanderhayden*, 17 Johns., 167; *Lowell v. Daniels*, 2 Gray, 161.

¶ See chapters "Separate Estate," "Estoppels as to Married Women," etc.

his employer, he is not estopped by such deed from claiming the land by an elder and after-acquired title. And, as to *landlord and tenant*, it is a well-established rule that the tenant cannot deny the title of the landlord, and the title as against the tenant is conclusively presumed to be perfect and valid. This presumption of law had its origin in feudal times, based upon reasons peculiar to the feudal land system, but the rule is still retained in its full vigor; although the feudal reasons have ceased, other grounds of public policy uphold the principle.* But this rule does not have the same binding force between such parties as relessor and releasee, where the latter has not received possession from the former. In a case of this kind, where the party already in possession of land under a claim of title by deed, purchases peace and quietness of enjoyment by the extinction of a hostile claim by a release, without covenant of title, he is not estopped from denying the validity of the title, which he has thus far extinguished.† Nor does the estoppel apply to the tenant who has been ousted by a superior title, nor where the tenant has been induced into the contract by fraud or misrepresentation of the lessor, and has not derived any benefit from the possession of the land. If the lease has expired, the tenant must quit the possession, or submit to the title of the new landlord, before he is relieved from the estoppel.

The defendant in ejectment is not estopped from showing that the party under whom the lessor claims had no title when he conveyed to the lessor, although the defendant himself claims under the same party, if it be by a subsequent conveyance. Estoppels by deed do not apply to that which is merely descriptive, as the quantity of land, its nature, whether arable or meadow,—it applies only to the essential averments.‡ See chapters on “Estoppel,” and “Estoppel on Married Women.”

* *Jackson v. Mills*, 13 Johns., 463; 1 Greenl. Ev., § 24 (note 3).

† See *Blight's Lessee v. Rochester*, 7 Wheat., 535, 547.

‡ The State is not estopped by the recitals in its own grants or patents, as they are considered as made on the suggestion of the grantee. But where the State claims title under the deed or other solemn act of third persons, it takes *cum onere*, and subject to all the estoppels as other privies in estate. Judge Story, in *Carver v. Jackson*, 4 Peters, 83. See, also, 10 Mass., 155; *Penrose v. Griffith*, 4 Binn., 231.

As to the Recital of the Payment of Consideration-money.—As to whether the recital in a deed is a conclusive presumption of the amount of the consideration, and of the payment of the same, the authorities are not in harmony in England and in this country. In England, the *recital* is regarded as conclusive evidence of payment, binding the parties by estoppel.*

But the weight of authority in the American States seems to be different, and this recital may be explained and contradicted, though the party may be estopped from denying the conveyance, and that it was for a valuable consideration.

In an action to recover the price, or to recover back the consideration, by the grantee, the recital is treated as only *prima facie* of the amount paid.†

In North Carolina the courts hold the recital of payment as conclusive.‡ But, in the argument at the bar of the case of *Graves v. Carter*, Mr. Ruffin (afterwards Chief Justice) said the rule, although so held in *Brocket v. Foscue*, was not satisfactory to the profession.

This estoppel in consequence of the recital in the deed of the payment of the purchase-money, applies alone to a court of *law*,—in equity, if no consideration be paid, the vendee is trustee for the vendor.§ And in England, where the recital is held conclusive in a court of law, a court of equity will enforce the vendor's lien, not only against the vendee, but also against the purchaser from the vendee with notice of the unpaid purchase-money. It is said that estoppels are not admitted in equity against the truth,

* *Rountree v. Jacob*, 2 Taunt., 141; *Lampon v. Corke*, 5 B. & Ald., 606; *Baker v. Dewey*, 1 B. & C., 704. See, also, *Powell v. Monson*, 3 Mason, 347.

† See the following American cases: *Wilkinson v. Scott*, 17 Mass., 247; *Wheeler v. Billings*, 38 N. Y., 263; *Clapp v. Tirrell*, 20 Pick., 247; *Livermore v. Aldrich*, 5 Cush., 431; *Tyler v. Carlton*, 7 Greenl., 175; *Beach v. Packard*, 10 Verm., 96; *Morse v. Shattuck*, 4 New H., 229; *Belden v. Seymore*, 8 Conn., 304; *Bowen v. Bell*, 20 Johns., 388; 9 Cowen, 266; 16 Wend., 460; *Watson v. Blaine*, 12 Serg. & Rawle, 131; *Higdon v. Thomas*, 1 Har. & Gill, 139; *Harvey v. Alexander*, 1 Randolph (Va.), 219; *Garrett v. Stuart*, 1 McCord, 514; *Mead v. Steger*, 5 Porter (Ala.), 498; *Jones v. Ward*, 10 Yerger, 160-166; 2 Ohio, 350.

‡ *Brocket v. Foscue*, 1 Hawks., 54; *Spiers v. Clay*, 4 Hawks., 22; *Jones v. Sasser*, 1 Dev. & Bat., 452; *Graves v. Carter*, 2 Hawks., 576.

§ Where a judgment is relied on as *res adjudicata*, it must have been one of a legally constituted court, and must proceed from a court of competent jurisdiction. *Bigelow on Estoppel*, 13; *Freeman on Judgments*, 252.

therefore, in case of fraud or other grounds of equitable interference, the recital as to the consideration is not conclusive.* In case of *gross inadequacy*, equity will interfere, especially if the parties can be placed in *status quo*.†

CHAPTER VIII.

BOUNDARY—PAROL EVIDENCE.

IN the determination of the title to land in the courts of law the question of boundary is one of very great importance, and the questions which arise are frequently of the most intricate and complicated character.

Mr. Bouvier thus defines boundary :

"1. By this term is understood, in general, every separation, natural or artificial, which marks the confines or line of division of two contiguous estates.

"2. Boundary also signifies stones or other materials inserted in the earth on the confines of two estates.

"3. Boundaries are either *natural* or *artificial*. A river, or

* *Definition : Estoppel*.—An estoppel is a preclusion in law which prevents a man from alleging or denying a fact in consequence of his own previous act, allegation, or denial of a contrary tenor.—Steph. Pl. 239.

"An estoppel is when a man is concluded by his own act or acceptance to say the truth."—*Lord Coke*.

"An estoppel, to be a special plea in bar, happens where a man has done some act, or executed some deed, which estops or precludes him from averring anything to the contrary."—*Blackstone*.

They are said to be odious in law.—1 Serg. & R., 444.

Estoppels may arise from matters of *record*, or *deed*, or from matter in *pais*, that is, matter of *fact*.

The estoppel growing out of the relation of the tenant to the landlord is an instance of estoppel in *pais*, and is considered a *conclusive* presumption of law.

Every estoppel must be reciprocal. It must be specially pleaded.

† 1 Story, Eq. Jur., §§ 245, 246, 250; Barrett v. Spratt, 4 Ire., Eq., 171.

other stream is a natural boundary; and in that case the centre of the stream is the line.

"4. An artificial boundary is one made by man.

"5. The description of land in a deed by specific boundaries is conclusive as to the quantity; and if the quantity be expressed as a part of the description it will be inoperative; and it is immaterial whether the quantity contained within the specified boundaries be greater or less than that expressed."*

What is boundary is therefore a question of *law*; *where* these objects are the jury must ascertain, after being instructed in the rules of law which pertain thereto.

The patent, deed, or other paper-title, is supposed to contain the *intention* of the parties, and, to ascertain that *intent*, the law has adopted *rules of construction*.

One rule is to give most effect to those things about which men are least liable to mistake.†

Therefore the things by which land is usually described may be thus stated in reference to their relative importance:

1. The highest regard is had to *natural boundaries*.
2. The lines *actually run*, and *corners actually marked* at the time of the grant.
3. If the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; and no departure from the deed is thereby required. *Marked* lines prevailing over those *not* marked.

4. To courses and distances; giving preference to the one or the other, according to circumstances.‡

And in determining the lines of old surveys, in the absence of any monuments to be found, the variation of the needle from the true meridian, at the date of the original survey, should be ascertained; and this is to be found by the jury, it being a question of fact, and not of law.§

* 1 Bouv. L. Dic. 189; Burrill's L. Dic., title "Boundary;" Tyler on Boundary.

† Davis v. Rainsford, 17 Mass., 210; McIver v. Walker, 9 Cranch, 178.

‡ 1 Greenl. Ev., § 301 (notes), and authorities cited; Tyler on Boundary and Fences, 29; Funa v. Manning, 11 Hump. (Tenn.), 311. See Tyler on Boundaries, ch. 23.

§ Burgen v. Chenault, 9 B. Monroe, 285; Gaylord v. Gaylord, 3 Jones (N. C.), 367.

"Monuments mentioned in the deed, and not then existing, but which are forthwith erected by the parties, in order to conform to the deed, will be regarded as the monuments referred to, and will control the distance given in the deed."*

Fitting the Description to the Premises.—There is great difficulty sometimes in fitting the description in the patent or deed to the land, and this requires some rules of construction, and frequently aid from parol testimony.

Sometimes it happens that the description is true in part, but not true in every particular. The rule in such cases is derived from the maxim: "*Falsa demonstratio non nocet, cum de corpore constat.*"† "Here so much of the description as is false is rejected; and the instrument will take effect, if a sufficient description remains to ascertain its application." Enough must remain to show plainly the intent. Mr. Greenleaf quotes Mr. Justice Parke as saying: "The rule is clearly settled that, when there is a sufficient description set forth of the premises, by giving the particular name of a close or otherwise, we may reject a *false* demonstration; but that, if the premises be described in general terms, and a particular description be added, the *latter* controls the former. It is not, however, because one part of the description is placed first and the other last in the sentence; but because, taking the whole together, that intention is manifest. For, indeed, it is vain to imagine one part before another, for though words can neither be spoken nor written at once, yet the mind of the author comprehends them at once, which gives *vitam et modum* to the sentence."‡ And this case is given: Land was described in a patent as lying in the county of M., and further described by reference to *natural monuments*; and it appeared that the land described by the monuments was in the county of H., and not of M. That

* *Makepeace v. Bancroft*, 12 Mass., 469; *Blaney v. Rice*, 20 Pick., 62; *Leonard v. Morrill*, 2 N. Hamp., 197; 6 Peters, 345.

† *Broom's Maxims*, 269; 1 Greenl. Ev., § 301; *Goff v. Pope*, 83 N. C., 123.

As to the rules of construing paper titles, and when certain calls may be rejected, see *Massie v. Watts*, 6 Cranch, 148 (C. J. Marshall), and *Boardman v. Lessees of Reed et al.*, 6 Peters, 328 (Mr. Justice McLean). See this last case, as to *hearsay* evidence, to establish boundary.

‡ 1 Greenl. Ev., § 301.

part of the description which related to the county was rejected. *Utile per inutile non vitiatur*.*

Says Judge McLean:† "The entire description in the patent must be taken, and the identity of the land ascertained by a reasonable construction of the language used. If there be a repugnant call, which, by the other calls in the patent, clearly appears to have been made through mistake, that does not make void the patent.

"But if the land granted be so inaccurately described as to render its identity wholly uncertain, it is admitted that the grant

* 1. See *Campbell v. McArthur*, 2 Hawks (N. C.), 33, in which the following charge of the court below was sustained: "That a mistake in a course or distance should not be permitted to disappoint the intent of the parties, if that intent appeared, and if the means of correcting the mistake are furnished either by a more certain description in the same deed, or by reference to another deed containing a more certain description."

The deed in question made special reference to a 640 patent to Thomas Lock, etc. In accord, *Tatum v. Sawyer*, 2 Hawks., 226.

2. The following North Carolina cases illustrate the rule that when a person or thing is sufficiently identified by name or description in a deed or will, the error in a further and unnecessary false description will not hurt. *Mayo v. Blount*, 1 Ire., 283; *Simpson v. King*, 1 Ire. Eq., 11; *Ehringhouse v. Cartwright*, 8 Ire., 39; *Barnes v. Simms*, 5 Ire. Eq., 392; *Joiner v. Joiner*, 2 Jones Eq., 68; *President of the Deaf and Dumb Institute v. Norwood*, Busb. Eq., 65; *Moses v. Peck*, 3 Jones, 520 (the latter cases as to where parol evidence is admissible to aid a defective description).

3. "The general rule, that courses and distances must yield to natural or artificial monuments or objects, is upon the legal presumption that all grants and conveyances are made with reference to an actual view of the premises by the parties. And where the grammatical sense of the words is not in harmony with the obvious intention of the parties, one word will be substituted for another for the purpose of giving effect to such intention. And still another general proposition may be stated in connection with this subject, that the description of boundaries in a deed is to be taken most strongly against the grantor." *Tyler on Boundaries and Fences*, 30.

"A grant shall not perish, if we can spell out its meaning."

4. "The safest rule that can be adopted, where it can be made to apply, is to take the grant and compare it with the calls. If there appears to be a fitness between that and the artificial and natural calls found on the ground it is certainly safer to rely upon such evidence than to rely upon loose statements, by which the grant might be totally destroyed or lost." *Patton's Lessee v. Dixon*, *Peck's R. Tenn.*, 149; *Ibid.*, 364; *Funa v. Manning*, 11 *Humph.*, 311; *Cherry v. Slade*, 3 *Humph.*, 82.

† *Robinson v. Kime*, 70 N. Y., 147; *Boardman v. Reed & Ford's Lessees*, 6 *Peters U. S.*, 328-345 (10 *Curtis*), 135.

is void." So it is held that, if lands are described by the number or name of the lot or parcel, and also by metes and bounds, and the grantor owns lands answering to one description and not to another, the description of the lands which he owned will be taken to be the true one, and the other rejected as *falsa demonstratio*.^{*} And it is the province of the court to construe the instrument, and is error to submit the same to a jury.[†] "He must tell the jury what are the boundaries of the land conveyed, according to the terms of the description; and it is for the jury to ascertain where are the objects called for and by which the boundaries are controlled, and to fit the description to the thing described."[‡] But the evidence from which the jury is to find the location consists mostly in that detailed by the witnesses and experts who testify before them. Thus the surveyor, who is an *expert*, as well as others who were with him in making the survey, can say what "corners," "lines," "marked trees," or other objects called for in the deed were *found*. They can give the "distances" and the degrees of variation, and they can describe such surveyors' *marks* as were found. And if the surveyor has taken blocks from the trees found marked, he can give his opinion as to the time since which they were made; also his opinion as to the *apparent* age of the marks on a tree without "blocking" the same.[§]

The party offering the deed, which describes the lands by metes and bounds, calling for such and such monuments, is supposed to take the burden of showing to the jury, by the preponderance of testimony, that these "calls" and "monuments" do embrace the lands as he claims. The party opposed has the right to resist this conclusion by all the means recognized by the law and practice of the court.

The Beginning Corner.—It is obvious that if no beginning "corner" is readily found, that a difficulty is presented of a

^{*} *Loomis v. Jackson*, 19 Johns., 449; *Jackson v. Marsh*, 6 Cow., 281; *Worthington v. Hylyer*, 4 Mass., 196. See, also, *Barclay v. Howell's Lessee*, 6 Peters, 498.

[†] *Jones v. Bunker*, 83 N. C., 324.

[‡] *Burnett v. Thompson*, 13 Ire., 379; *Marshall v. Fisher*, 1 Jones, 111; *Clark v. Wagner*, 70 N. C., 706; *Dana v. Middlesex Bank*, 10 Metcalf (Mass.), 250; *Dyson v. Leek*, 2 Rich. (S. C.), 543.

[§] *West v. Shaw*, 67 N. C., 483.

serious character. Every description must have a beginning "call," and that beginning "point" must be shown to the jury and to the court.

We will now take a case.* "The controversy was as to the *beginning* corner of the land. The plaintiff alleged it was at a *red oak*, on the bank of the river, which was Philip Brittain's upper line, where it *crossed the river*, and a conditional line, agreed on between said Brittain and one William Jones."

The plaintiff testified in his own behalf that he had known the red oak on the bank of the river as the beginning corner for fifteen years; that he was told by one Corsewell and one Roper (both dead) that the red oak was on Philip Brittain's upper line, and that the tree was marked on the east and west. Other testimony to the same purport, but no writings, were offered to show where Philip Brittain's line was (which crossed the river).

The court said: "The land in controversy was known as the Brittain land. It must have had some boundaries, and there is no principle of law better settled than that the location of boundaries may be proved by parol or reputation. Nothing is more common in practice, when a deed calls for the corner of an adjacent tract, than to prove by parol the declarations of deceased witnesses, for instance, where the *corner stands*, without showing in evidence any deed to the owner of the land. It is often a matter of mere hearsay, but may not be proved by other more direct means; and, therefore, was perfectly competent for the plaintiff, as he has done in this case, to prove by the declarations of deceased witnesses that the *red oak*, claimed by him as the *beginning*, was Philip Brittain's upper line."

Boundaries Established by Reputation and Hearsay.—This leads us to inquire more particularly into this doctrine of establishing *boundary by reputation and hearsay*. In the first place it is a general rule that all *hearsay* testimony is incompetent, and that for obvious reasons. But this rule has certain exceptions which have long been recognized by the courts. One of these exceptions

* *Huffman v. Walker*, 83 N. C., 411. And to sustain this case, Ashe, Judge, in the opinion refers to *Standin v. Bains*, 1 Hay., 258; *Taylor v. Shufford*, 4 Hawks., 116; *Hartzog v. Hubbard*, 2 Dev. & B., 241; *Hendricks v. Gobble*, 63 N. C., 48.

is that in relation to matters of *public and general interest*.^{*} This rule is applied to that which simply concerns a multitude of people, which, in fact, does not concern all the citizens and every member of the state. The reason given for this exception is upon the supposed probability that in a matter of *public right* all are somewhat familiar and conversant. Evidence of *common reputation* is received in regard to *public facts*, as the claim of a highway or right of ferry.[†] And in matters of this kind, says the same author, "reputation from any *one* appears to be receivable; but of course it is almost worthless unless it comes from persons who are shown to have some *means of knowledge*, such as in the case of a highway, by living in the neighborhood." But this affects the weight of the testimony and not its competency. There are other important qualifications of the rule which will be noticed further along when we see how this doctrine of common reputation is applied to *private boundary* questions. It is well settled by this rule and by the adjudications in *England* that reputation and hearsay are not competent in questions of mere *private boundary*, but that the rule only extended to proof of the boundaries of parishes, manors, and the like, which are of *public interest* generally. But this doctrine has been either modified or entirely changed in the American States in questions of boundary. Let us notice some of the earlier cases. In *Boardman v. Reed*‡ the land in dispute was a tract of eight thousand acres and was a part of a large connection of surveys made together, and containing between fifty and a hundred thousand acres. The reasoning in that case was: the greatest portion of our territory was originally surveyed in large masses or tracts, owned either by the State or the United States, or by one or a company of proprietors; these tracts were again surveyed and divided into lots suit-

^{*} 1 Greenl. Ev., § 127.

[†] 1 Greenl. Ev., § 128. Mr. Tyler, in his work on Boundaries and Fences, cites among others the following cases, which hold that *reputation* and *hearsay* are admissible: *Con. v. Penn.*, 1 Peters C. C. R., 496; *Daggett v. Wiley*, 6 Florida, 482; *Walton v. Ogden*, 1 Johns. R., 156; *Kinney v. Farnsworth*, 17 Conn., 355; *Coles v. Wooding*, 2 Patton & Heath (Va.), 189; *Cherry v. Boyd*, 6 Littell's R., 7. In Alabama general reputation is admissible as to *public* lots, but as to a *private* boundary it is left *query*? *Farmer's Heirs v. Mayor of Mobile*, 8 Ala., 279.

[‡] *Boardman v. Reed*, 6 Peters U. S., 328.

able for single farms by lines crossing the whole tract, and serving as the common boundary of very many farm lots lying on each side of it. So that it is hardly possible in such cases to prove the original boundaries of one farm without affecting the common boundary of many; and thus, in trials of this sort, the question is similar in principle to that of the boundaries of a manor, and therefore traditional evidence is freely admitted.

The case of *Tate v. Southard** is a strong case, decided in North Carolina in 1820, opinion by Judge Henderson, who seemed to have a clear appreciation of the limit to which the exception to the rule excluding hearsay evidence is carried.

The defendant was attempting to show possession under the Act of 1791, ch. 15, to "known and visible boundaries." The defendant exhibited no grant, but possession for twenty-nine years. He proved that the land claimed by him was surrounded by other tracts, and that it was understood and believed by all the neighbors that the land thus inclosed by the lines of surrounding tracts was Kennedy's at the time of the sale in 1783, and had been called Greenlee's ever since, although the witnesses had never known any line *run and marked* for *Kennedy's line*. Also an old grant for adjoining land was produced calling for Kennedy's lines; that about thirty acres were cleared; that many years ago a branch was shown a witness (by a party now dead) as a dividing line between Kennedy's and another tract. Also another witness testified that a person (now dead), who lived in the neighborhood, had shown where another line of Kennedy's crossed. This evidence was held by the court as *competent*, thereby establishing the boundary of an *entire tract of land by*

* *Doe & Tate v. Southard*, 1 Hawks, 45.

In *Elliott v. Pearl*, 10 Peters, 412, Judge Story, on the same bench with McLean (who delivered the opinion in *Boardman v. Reed*), seems to take directly the opposite view, and ignores substantially the rule of admitting reputation in questions of private boundary. So much for diversity of opinion in the same court.

In Kentucky the proof of boundary by common reputation is freely admitted, as appears by several cases: *Smith v. Nowells*, 2 Littell, 160; *a fortiori* an ancient judgment establishing a boundary long acquiesced in is competent evidence: *Smith v. Shackelford*, 9 Dana, 465. On this and many other general questions of boundary consult the opinion of Judge Lumpkin in *Biley v. Griffin*, 16 Ga., 141.

general reputation in the neighborhood and the hearsay evidence of what deceased persons had said.

This is certainly a strong case in favor of the idea of showing boundary by *reputation* and *hearsay*.

And five years thereafter, in the case of *Taylor v. Shufford*,* the same judge affirmed the doctrine.

It is true that in *Taylor v. Shufford* the proof was in reference to the recognition of Lord Granville's line, which extended from the ocean two or three hundred miles through the State, and became the boundary for counties, and therefore more like a great *public* boundary, but still the doctrine was recognized as applicable to all questions of boundary between individuals. Then in *Sasser v. Herring*† it was fully admitted that in this State the rules of the common law in questions of private boundary have been broken in upon. The court said: "We have in questions of boundary given to the declarations of a deceased individual as to a line or corner the weight of common reputation, and permitted such declarations to be proven, under the rule that in questions of boundary *hearsay* is evidence. Whether this is within the spirit and reason of the rule it is now too late to inquire. It is the *well-established law of this State*. And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country and the want of self-evident termini of our lands, would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have in this instance sacrificed the principles upon which the rules of evidence are founded." Other States have adopted the same rule in this regard, especially Connecticut,‡ Pennsylvania,§ Tennessee,|| South Carolina,¶ Ken-

* *Doe & Taylor v. Shufford*, 4 Hawks, 116. In accord, 13 Conn., 309; see *Phillips Ev. by Cowan & Hill*, note 186, p. 239; 3 McCord, 158.

† *Sasser v. Herring*, 3 Dev. Law, 340. In accord, *Mendenhall v. Cassels*, 3 Dev. & Bat., 49; *Finley v. Dobson*, 8 Jones, 495. See the early case of *Holland v. Overton*, 4 Yerg. (Tenn.), to the same purport (opinion by Judge Catron); *Shute v. Thompson*, 15 Wall., 163; *Scuggins v. Dalrymple*, 7 Jones's Law N. C., 46.

‡ *Hinny v. Farnsworth*, 17 Conn. R., 355, 363.

§ *Nieman v. Ward*, 1 Watts & Serg., 68.

|| *Beard v. Talbot*, 1 Cook, 142.

¶ *Spear v. Coat*, 3 McCord, 227.

tucky,* and New Hampshire.† But Mr. Redfield, in his notes to Greenleaf on Evidence, thinks that with these exceptions the common-law rule prevails in most of the States.‡ Mr. Greenleaf himself in the text says: "Accordingly, though evidence of reputation is received, in regard to boundaries of parishes, manors, and the like, which are of public interest and generally of remote antiquity, yet, by the weight of authority and upon better reason, such evidence is held to be inadmissible for the purpose of proving the boundary of a private estate, when such boundary is not identified with another of a public or *quasi* public nature."

But Mr. Redfield, in the note to Mr. Greenleaf, says: "In several American cases, which have sometimes been cited in favor of the admissibility of traditionary evidence of boundary, even though it consisted of particular facts, and in cases of merely private concern, the evidence was clearly admissible on other grounds, either as part of the original *res gestæ*, or as the declaration of a party in possession, explanatory of the nature and extent of his claim." And to that class he refers the cases in the note.§

Notwithstanding what is said by Mr. Greenleaf, the Supreme Court of the United States, in the case of Boardman v. Lessee of Reed, already cited, treated the general doctrine as well-established in this country, that *reputation* and *hearsay* are admissible in questions of private boundary. But of course the hearsay must

* Smith v. Prewitt, 2 A. K. Marsh, 155.

† Great Falls Co. v. Worster, 15 N. Hamp., 412, 437; Smith v. Powers, *idem*, 546, 564.

‡ 1 Greenl. Ev., § 145 (note 1).

"In proving the *beginning* corner of a survey a witness may testify what another told him *he* heard an actor say upon the subject, both persons being dead." Beard v. Talbot, Cooke (Tenn.), 142. "The evidence is weakened at every move, but still competent," *ibi*. "If this were not so the accident of the death of a witness would deprive men of the benefit of facts, which, but for the accident, might have been availed of," *id*.

§ *Caufman v. The Congregation of Cedar Spring*, 6 Binn., 59; *Sturgeon v. Waugh*, 2 Yeates, 476; *Jackson & McDonald v. McCall*, 10 Johns., 377; *Hamilton v. Minor*, 2 S. & R., 70; *Higley v. Bidwell*, 9 Conn., 477; *Hall v. Gittings*, 2 Har. & Johns., 112; *Redding v. McCubbin*, 1 Har. & McHen., 309. He thinks that what Judge Church said in *Wooster v. Butler*, 13 Conn., 309, holding that reputation was admissible in ascertaining boundary between private individuals, was not called for in the case. But the doctrine was subsequently held good in *Hinny v. Farnsworth*, 17 Conn., 355, 363.

have *relevancy* to the point in dispute. The mere fact that a witness had spoken of "a marked corner" in the vicinity, without fixing it with reasonable certainty in *connection* with the one in dispute, is no evidence. Such a "corner" might have been the corner of another tract not in dispute.*

How this Rule is Qualified.—In applying common reputation and hearsay to private disputes in land the rule is qualified in like manner as when applied to a dispute about a *public* fact. 1. This proof must come from persons who are shown to have some *means* of knowledge, such as in the case of a highway, by living in the neighborhood. So, in case of *private* boundary, the person should have some reasonable means of knowing the facts; such as having owned adjacent lands, possessed that in controversy, or old persons who speak of the facts under circumstances indicating a want of motive to tell a falsehood, etc. And, if statements of deceased persons are shown, they should come from persons with like means of knowledge, and free from interest or bias. Another important qualification is, that the declaration *must have been made before any controversy arose* touching the matter to which they relate;† or, as it is usually expressed, *ante litem motam*. On the reason of this rule it is said: "The ground on which such evidence is admitted at all is, that the declarations are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth."‡ If there be a *controversy*, people in the neighborhood take sides; their minds are in a ferment; and, even where men are disposed to speak the truth, facts after a controversy are liable to be seen through a false medium. But this qualification implies that *the controversy should be upon the same particular subject in issue*.

Declarations, if made *post litem motam*, are excluded, even if it appear that the controversy was not known to the declarant.§

* As to reputation in boundary of city street in Richmond, see *Ralston v. Miller*, 3 Randolph, 44, where reputation was held of the highest importance.

† 1 Greenl. Ev., § 131.

‡ *Whitelocke v. Baker*, 13 Ves., 514. Per Ld. Eldon.

The term *lis* is taken in its classical and larger sense of controversy; and by *lis mota* is understood the commencement of the controversy, and not the commencement of the suit. 1 Greenl. Ev., § 131, and note.

§ 1 Greenl. Ev., § 133, where the doctrine is fully discussed, and full notes, both as to the civil and common rule, on this point.

The first qualification of the rule mentioned only goes to the credibility of the witness, but the second qualification herein mentioned excludes the evidence from the jury. It is, however, in reference to the first qualification of the rule that a strong objection has been urged by the English judges especially. Said Lord Kenyon, in *Morewood v. Wood* :* "Evidence of reputation, upon general points, is receivable; because, all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles? How is it possible for strangers to know anything of what concerns only private titles?" This argument of the English judge has the air of great plausibility, and may contain much truth, but the view is too circumscribed. It is a matter of observation in this country that the old men of every neighborhood have a very accurate knowledge of all the prominent *lines* and "corners" of the different tracts of land in the neighborhood. The cutting-up into small farms, the frequent cultivation or use of timber up to certain lines, and the frequent cause for attention being called to "lines" and "corners" of *adjacent tracts*, tend greatly to familiarize men of ordinary observation with these facts. The habits of hunting and roaming, and watching stock, which prevail in most of our rural districts, give each man an opportunity to know much of the boundaries of his neighbor's land. Hundreds of them could go to each line or marked tree on his neighbor's land who have no idea at all of a single "point" which separates *two counties*. The requisition of the law in requiring entries and surveys to be made by the designation of natural boundaries, the habits of land-owners and surveyors making "marked lines," designating "corners," etc., then placing the same upon record, all tend to make each man's lines *open* to the *public* to such an extent that a question of boundary is in some sense a *public* question, about which all men in the vicinity of the controversy may speak when the question is in reference to an *ancient possession*; or, in plainer language, in reference to "old titles."

Indeed, the same reasons apply which are applicable to what

* *Morewood v. Wood*, 14 East, 329; 1 Starkie Ev., 30.

is called *perambulations* in England. The writ, *de perambulatione faciende*, lies at common law when two lords are in doubt as to the boundary of their lordships' villas, and by consent appear in chancery and agree that a perambulation be made between them. When this order is executed under the writ not only is the record a high order of evidence, but the acts of persons making it, and their assistants in marking boundaries and setting monuments, and their *declarations* while such acts are being done, are competent evidence.

The plat of survey attached may become evidence in explanation of the grant to show what land was actually appropriated at the time; see note *infra*. The declarations of the parties, and especially of the surveyor (all being dead) may be shown under the rules and restrictions stated.*

Some of the States have statutes providing for the settlement of private boundary; others have what they call "processioning acts,"† etc. It would seem that the rule of evidence which prevails in case of *perambulations* in England, should apply to proceedings, acts, and declarations of the parties performing these "processioning acts," especially after a long lapse of time, and it appearing that the acts and declarations were *res gestæ* in the discharge of duty, and no selfish or interested motive is shown.

But a *third qualification* is important to be mentioned, namely: *The persons from whom the information was obtained must be free from any interest at the time.* The declarations from deceased persons should appear free from the excitement of the *lis mota*, and from the temptation of interest. Likewise, if the witness be called to what is claimed as strictly *general reputation*, it should

* In the case of *Barclay v. Howell's Lessee*, 6 Peters (U.S.), 498, the controversy was in regard to a lot in the city of Pittsburgh, Pa. All the land embracing this city having belonged to the Penns, an agent was authorized to lay out the town-survey, make plats, as well as deeds to the same. In a subsequent suit, involving boundary, the declarations of Penn's agents as to certain objects of boundary were held admissible as a part of the *res gestæ*.

† It often happens, in the States where the land was intended to be surveyed under the United States laws into townships, etc., that doubts arise, and in some instances the legislature provides for a special survey and report. Under a report of this kind the courts adopt the general rules of evidence as explained in this chapter in the ascertainment of where the original location was made. On this point, see an interesting case in Illinois, *Calvin et al. v. Fell et al.*, 40 Ill., 418. See note of Illinois decisions, *infra*.

appear that this public opinion was *general* in the neighborhood, free from any manufactured opinion growing out of a lawsuit, or personal and biased contentions.

Difference in the Rule, when applied to Boundary, as to Proof of Particular Facts.—At common law, while reputation was admissible to prove a matter of public and general interest, it was not allowable to prove *particular facts*, as thus illustrated by Mr. Greenleaf: Where the question on the record was, whether a turnpike was within the limits of a certain town, evidence was admitted to show that the bounds of the town extended as far as a certain close, but not that formerly there were houses where none then stood; the latter being a particular fact, in which the public had no interest.

But we have seen, in those States where the common law has been overruled on this subject, that both *reputation* and *hearsay* are competent to prove *particular facts* which assist in the determination of the boundary; thus, in the case of *Tate v. Southard*, *supra*,* both kinds of evidence were admitted. It was shown: 1st. That it had long been reported and believed in the neighborhood that the tract in dispute (inclosed by certain lines of adjacent tracts) was the "Kennedy" tract. 2d. By a witness, that many years ago a party (now dead) pointed out a "branch" as one of the "Kennedy" lines. This testimony was *general* as to the whole tract, but consisted of *particular facts* as detailed by the *hearsay* as to deceased witnesses. So, it is competent to prove a *particular* "corner," a *particular* "line," by *reputation*, or by *hearsay*, from persons deceased, under the qualifications stated.

As to the Calls by Adjacent Proprietors.—At common law the proof of reputation was not confined to *oral* testimony, but applied to documentary evidence as well. Under this idea, deeds, leases, and other private documents have been admitted as proof of the recitals therein of a *public nature*. Maps, also, made by persons with adequate knowledge, showing the bounds of towns or parishes, were admissible.† This was the rule when the matter of controversy was ancient.

* *Doe & Tate v. Southard*, 1 Hawks (N. C.), 45; *Boardman's Lessee v. Reed*, 6 Peters (U. S. R.), 328. In the case of *Mendenhall v. Cassels*, 3 Dev. & B. (N. C. Law), 49, *reputation* was *not* admitted, because "too indefinite to amount to any evidence."

† 1 Greenl. Ev., § 139.

So it is supposed that in those States where the rule of the common law is modified in favor of fixing ancient boundaries that documents of this character are admissible.

Consequently, in order to show boundary, it is competent, and often the most satisfactory evidence, to produce the deeds or grants of adjacent land proprietors, which call for and designate certain "corners" and "lines" of the tract in dispute.

Take the case of *Finley v. Dobson*,* *infra*, the call was for "beginning" at a stake, "Thomas Young's corner." But, in fact, the Thomas Young tract of land was situate two miles distant, and to have begun there, no vacant land could have been found at the date of the Dobson grant. But to show the beginning corner, the *second* and *third* corners were *established* so clearly, that by *reversing* the calls, the real point of beginning was ascertained, but not at the Thomas Young tract (which call was a mistake).

The Dobson grant was an old grant; he and others had been in possession for many years; but the most controlling evidence was, that several old deeds were produced calling for and recognizing the *second* and *third* corners, and two entire lines of the Dobson tract. These deeds were old, and most of the former occupants being dead, the declarations of deceased persons were admitted also. The claim to the Dobson deed was satisfactory and conclusive, and the jury so found.

This *ancient recognition*, so to speak, in the opinion of the writer, is the most reliable, satisfactory, and trustworthy evidence which can be offered in a doubtful question of location. It is not quite clear whether such evidence comes under the head of *reputation* or *hearsay*. Perhaps, where *several* adjacent proprietors have called for the same tract, and for different points on the same tract, all coinciding in the same idea of location, it might be called proof by *reputation*; it might be considered equivalent to "*generally understood in the neighborhood*." But if only one, or perhaps two deeds, are produced, it might be nothing more

* *Finley v. Dobson*, 8 Jones (N. C.), 495. As to a reference to plats, surveys, declarations of party at the time, etc., see *Barclay v. Howell's Lessee*, 6 Peters, 498 (in 10 Curtis, 202), in which the calls were for a lot in Pittsburgh, designated No. 183, bounded by a *street* and the *river*; the jury were instructed that they might reject the *river* if it appeared a mistake, the lot being sufficiently designated and described.

than the *declaration* of a person or persons, now deceased, of a *particular fact*, which is competent under the restrictions before stated. It would seem of more force than a *parol* declaration ; it was not only *known* as a fact, but so *declared* at the time in *writing*. The greater the number, the more conclusive the evidence.

It is true that C. J. Pearson, in *Dobson v. Finley*,* describes these calls and recognitions by adjoining deeds and grants as that of proof by *reputation*, and distinguishes it from *hearsay*, which was admitted in the same case, the hearsay relating to the declarations of deceased persons as to a particular corner, and says the adjacent deeds or grants are competent, although the parties to the deed or grant be living, but in hearsay the party making the declaration must be shown to be dead. But it is supposed that Judge Pearson did not mean to say that *reputation*, in questions of boundary, was confined to *written testimony*, which would be the effect of holding that these ancient recognitions by adjacent written conveyances was "*reputation*," and that no reputation of less solemnity was admissible in boundary questions. The North Carolina judges, in a large number of cases, from Judge Haywood's time to the present, have said that both *reputation* and *hearsay* are admissible in this class of disputes, and, without having attempted to qualify the meaning of the word "*reputation*," it is presumed they used it in the ordinary sense and meaning of that term.' When used at common law in regard to a *public boundary* it was *not* confined to *written evidence*. So, when they broke in on the common law, they applied *reputation* in the *same* sense, with the *same* qualifications, to *private* boundary. *Reputation* and *hearsay* are not the same thing, especially in their application to questions of boundary disputes.

Hearsay, to prove boundary, was admitted quite early in Maryland (1736), when it was a province.† In 1825 the Court of South Carolina held it competent to prove what a deceased chain-

* *Dobson v. Finley*, 8 Jones, 495. In *Scoggin v. Dalrymple*, 7 Jones, 46, it is held that the declaration of a deceased person is admissible to show a corner tree, though it was not in view at the time of the declaration, but the position of it was so described as to enable the witness, to whom the declaration was made, to find it.

† *Howell v. Tilden*, 1 Harris & McHenry, 84.

carrier had said at the time of the original survey, designating the fact of a certain tree being marked as a corner.* In Tennessee, where a grant called for a *stake* as a corner of the tract, it was held competent to prove that a white oak, marked as a corner, and *reputed* from 1796 to 1818 to be *the* corner, was the corner, although it stood one hundred and thirty-four poles east of where the distance called for terminated.†

In Texas the doctrine is admitted in several well-considered cases. Such, for instance, as the declarations of a deceased surveyor after running the line, and what had been said by old men now deceased.‡ In *Welder v. Carrol*, *infra*, it was said by the court that this kind of evidence should be carefully scrutinized. Boundary being a mixed question of *law* and fact, the *admission* of a party as to what is a *legal* boundary will not make it such, and he is not estopped by such an admission.§

The result of the cases may be given in the following summary:

1. Generally, in the United States (though opposed to the English rule), in questions of private boundaries of land *common reputation* is admissible.

2. *Hearsay* evidence is alike admissible when the declaration has been made by a person deceased.

3. Either in *reputation* or *hearsay* it must appear that the persons who speak had the *means of knowing* the facts; and the declarations by one acting in an *official capacity*, *declarations in disparagement of title*, and those classed as *res gestæ*, are entitled to most weight when *hearsay* is relied on.

4. That within these rules, deeds and grants of adjacent proprietors, which call for and recognize "lines" or "corners" of the land in dispute, are competent evidence in establishing the *locus in quo*.

* *Speer v. Coate*, 3 McCord, 227.

† *Lanman v. Brooks*, 4 Hay., 122; *Holland v. Overton*, 4 Yer., 482; *Davis v. Jones*, 3 Head., 603; *Moore v. Davis*, 4 Heisk., 544; *McCloud v. Mynatt*, 2 Cold., 165; *Hughlet v. Conner*, 12 Heisk., 86; *Beard v. Talbot*, Cooke, 142; *Lewallen v. Overton*, 9 Humph., 76.

‡ *George v. Thomas*, 16 Tex., 92; *De Leon*, 9 Tex., 607; *Lewis v. San Antonio*, 7 Tex., 301; *Stroud v. Springfield*, 28 Tex., 649; *Welder v. Carrol*, 29 Tex., 332.

§ *Polk's Lessee v. Robinson*, 1 Tenn., 456.

5. That in either case the testimony must be free from the excitement of the *lis mota* and the temptation of interest. And that the declarations made *post litam motam* are not competent, except when connected with like consistent declarations made *before controversy*.

6. As a safe rule, this kind of evidence in either aspect should be carefully scrutinized, the *qualifications* of the rules being in all cases observed.

7. The acts, conduct, admissions, and verbal agreements of the parties often have a controlling influence in establishing the *locus in quo*, especially when they have been acted upon by the adverse party for a number of years, acting as *estoppel*.*

Under the statute of frauds it is not competent to make a line in *parol*, except where the same is in *doubt and unknown*. Thus, in the case of *Gilchrist v. McGee*, the Supreme Court of Tennessee held that where the parties, with full knowledge of a line, make another in *parol*, it is within the statute of frauds, and will not bind the parties.†

As to declarations and conduct of a party in possession, when of the *res gestæ* they need not always be in *disparagement* of his title, but may frequently be admitted in *favor* of the title. And Mr. Greenleaf says: "But no good reason is perceived why every declaration accompanying the act of possession, whether in disparagement of the claimant's title, or otherwise qualifying the possession, if made in good faith, should not be received as a part of the *res gestæ*."‡ But such declarations are not admissible as a mere narrative of a past occurrence."§

Special Agreements as to a Boundary Line.—The courts will not disturb *parol* agreements or long acquiescence in a boundary line, but will encourage the same when applied to doubtful boundaries.||

* As to admissions, agreements, and conduct, see *Speers v. Walker*, 1 Head., 167; *Merriweather v. Lanman*, 5 Sneed, 447; *Burham v. Turbeffield*, 1 Swan., 437; 2 Sneed, 697; *Lewallen v. Overton*, 9 Humph., 76; *Gilchrist v. McGee*, 9 Yerger; 3 Head., 603.

† *Gilchrist v. McGee*, *supra*. Same doctrine in *Lewallen v. Overton*, 9 Humph., 76.

‡ 1 Greenl. Ev., § 109.

§ 1 Greenl. Ev., § 110; *Roberts v. Roberts*, 82 N. C., 29.

|| 5 Mass., 16; *McArthur v. Henry*, 35 Tex., 801.

Such agreements are not within the statute of frauds.*

These last-mentioned declarations, admissions, conduct, etc., are frequently used in showing the *character* of the *possession*, whether one claims in his *own* right or for *another*, or whether the same is held *bona fide* or *fraudulently*;† but the declarations of a party against his interest are frequently admitted in questions of boundary. Thus in *West v. Shaw*‡ it was held competent for the plaintiff to show that the defendant “pointed out” a certain tree as *his* corner, if the “spot” described is by another witness identified as the beginning corner. And as an admission it was allowed to show that the same defendant took a deed of a later date than the one under which he claimed in the suit calling for the “corner” as claimed by the plaintiff.

Of course in doubtful cases admissions, acts, and conduct of recognition of a particular corner or line may have great influence in the settlement of the question.

Indeed, in doubtful questions, the parties with a view of settling a dispute as to a line which is in *doubt* may fix a line in *parol*, and the long recognition and acquiescence in such line will be binding on the parties, even for a period less than twenty years.§ It must be the result of an honest effort to fix the line

* *Kincaid v. Dorney*, 47 Mo., 337; *Kellum v. Smith*, 65 Penna. Stat., 86; *Orr v. Hadley*, 36 N. H., 575; 23 Ark., 704; 49 Mo., 98; *Palmer v. Anderson*, 63 N. C., 365; *Wait's Actions and Defences*, vol. i., pp. 718-719.

† *Hilliard v. Phillips*, 81 N. C., 99, where it was held that the declarations of a bargainer, who remained in possession after executing a deed absolute in form to his brother, that the deed was fraudulent, were competent to show the fraud. It would not have been competent to impair the deed if he had not been in possession.

‡ *West v. Shaw*, 67 N. C., 483.

§ *Smith v. Hamilton*, 20 Mich., 433; 16 N. Y., 354; 7 Cush., 875. See 4 American Rep., 398 (*Noble v. Chrisman*, 88 Ill., 198), as to declarations of deceased parties.

The English Doctrine—Declarations of Deceased Occupiers.—The occupier of land is presumed to be *seised in fee* in the absence of proof to the contrary. 1 Tay. Ev., 122 (2d ed.), *Cole Eject.*, 232.

Therefore declarations made by a deceased occupier, showing that he held merely for his own life, or for a certain term, or as tenant of A. B., are *apparently against his own interest*, whether made orally or by writing, or by deed, and consequently are evidence after his death even as against third persons then holding or claiming the property. *Uncle v. Waters*, 4 Taunt., 16, per Lord Mansfield; *Taylor's Ev.*, 617. But it must be proved that the party making

and in case where it was involved in doubt. If the line is well known the statute of frauds requires writing to change the line.*

Marks and Lines may be shown, although not called for in the Patent or Deed, if made at the Time of the Original Survey.—It is most obvious that the original and best evidence of *what* lands the parties to the deed *intended* to pass is *that* land which was “viewed out” and actually *run* and *marked* at the time the trade was consummated. *This* is the land appropriated.

The parties might erect “monuments,” and intend a complete description, and yet by omission or mistake the deed might omit one or more important “monuments.” On this supposition, perhaps, and to serve the ends of justice, it has been allowed in some cases to show by *parol* evidence *marked lines or corners not called for* in the deed or grant.† In the case of *Slade v. Green*, *infra*,

such declaration was then or previously in possession of the property to which the statement relates. 4 Taunt., 17. Such parties must be dead; it is not sufficient that he is unable to attend the trial from serious indisposition, and lies without hope of recovery. *Cole Eject.*, 233.

“All statements made by a deceased person while in possession of property is original evidence if they go to cut down his interest.” Per Park, B., in *Doe & Welsh v. Langfield*, 16 M. & W., 514. The statements of a deceased occupier touching the party under whom he held are admissible evidence of that party’s seisin in fee, and not merely to negative the seisin in fee of such occupier. *Davies v. Pierce*, 2 T. R., 53; 4 Taunt., 16.

The statements of a deceased occupier of land which do not tend to limit or abridge his presumed estate or rights, but *rather to extend them*, are not admissible. *Lord Dunraven v. Llewellyn*, 15 Q. B., 812; *Sweeting v. Webber*, 1 A. & E., 733. Declarations of a deceased occupier, which merely affect the land itself and not his own estate or interest in it, are not admissible, except as against himself and persons claiming through or under him. Thus if he admit that a certain person (a neighbor) has an easement in the land, that is not admissible against the landlord or stranger. *Taylor’s Ev.*, 620; *Cole Eject.*, 233.

* In several recent cases in North Carolina it is held that the declarations of a deceased person as to boundary must appear to have been *disinterested*. *Hendrick v. Gobble*, 63 N. C., 45; *Sasser v. Herring*, 3 Dev., 340; *Caldwell v. Neily*, 81 N. C., 114.

† *Doe & Slade v. Green & Ryan*, 2 Hawks (N. C.), 218; *Cherry v. Slade*, 3 Murph. (N. C.), 82; *McNeil v. Massey*, 3 Hawks, 91; *Safret v. Hartman*, 5 Jones, 185; *Topping v. Sadler*, 5 Jones, 357; *Addington v. Jones*, 7 Jones, 262; *Caraway v. Chancy*, 6 Jones, 361.

In the last case and in *Safret v. Hartman* the *query* was suggested whether this doctrine was not alone applicable to grants from the State and *ancient* deeds, and not to *mesne* conveyances.

They say that certainly no running and marking not contemporaneous with such deed can be allowed to have such effect.

the attempt was made to show by the *declarations* of a deceased *chain-carrier* named in the *original* survey as to the *courses actually run* at the time, *differing* from the calls of the grant. But the court repudiated the idea, and said the courts had already gone to the verge of the law by allowing in some instances *marked* lines and corners, made at the time of original survey or the execution of the deed, to control calls for course and distance, although *these marked points or lines* were not called for in the deed.

Judge Henderson, in this opinion, seemed to deprecate the tendency of the courts in that State, prior to this period, to allow parol evidence too great influence in contradicting a deed. In one of his opinions on a boundary question, he said that some of the earlier cases under Judge Haywood's opinions had allowed *parol* testimony to the extent of absolutely nullifying the deed and a complete ignoring of the statute of frauds. In this case, Judge Henderson says: "But it must be confessed, however much to be lamented, that our courts have permitted parol evidence to contradict a deed. But the furthest they have gone is to permit *marked lines and corners* to be proved or shown when such marked lines and corners were not called for in the deed. Thus, where course and distance only are given in a deed, without reference to marked lines or corners, parol evidence has been admitted to vary that course and distance by showing *marked* lines and corners, which is in fact contradicting a deed by parol without there being an ambiguity; for in this case the deed refers to no such marks or boundaries, as it does in those cases where not only course and distance are given, but marked lines and corners are called for. And it is now too late to vary the rule. But I am disposed to go no further into error by analogous reasoning and to permit parol evidence to contradict or vary the description where there is no mark or vestige left. In the former cases there are some checks to frauds and perjuries, to wit, the *marked* lines and corners. In the latter there are none. For the former the courts of justice had something like an excuse, arising from our processioning laws, which require the pro-

It would seem that the rule should be the same in both cases, for the contemporaneous act of *marking* and *locating* by the parties is the best evidence of their intentions. *Reed v. Schenck*, 2 Dev., 415; *Graybill v. Powers*, 76 N. C., 66.

cessioners to observe natural boundaries in the first place, marked lines and corners in the second (meaning, no doubt, when called for in the deed), and course and distance in the absence of the other two, and from our laws directing surveyors to mark the lines and corners in surveying vacant and unappropriated lands. But I can see no plausible grounds for the admission of the evidence in the present case. It would place the boundaries of our lands at the mercy of perjured, ignorant, or forgetful men." This position of Judge Henderson was sustained in several subsequent cases* in that State.

In the late case, decided in 1880, the grant called for the "*beginning* on Little River bank, below his bridge on said river," (meaning below William Campbell's bridge). The question was as to the *beginning corner*. The plaintiff, in order to locate the beginning corner, proposed to prove "a pine stump, ninety yards *below* Campbell's bridge on the river," and that the same had been pointed out as such by *old persons*. The court below excluded the evidence on the ground that the description of the corner in the grant was too indefinite to admit of location by parol. But this holding was reversed. Smith, C. J., said: "It is settled," says Judge Pearson, "that a line of *marked* trees, or a *tree marked as a corner*, although not called for in the grant, or any natural object *called* for in the grant which can be identified, and has sufficient certainty to furnish of itself a description in the place of the course and distance set out in the grant, will be allowed the effect of contradicting the course and distance so as to make the line longer or shorter, or even to locate the land north of the beginning, instead of south of it," and then refers to the cases in the note.

It will be observed that the call was for "beginning on the river, below the bridge." No "monument" was named in the

* *Safret v. Hartman*, 5 Jones, 185; *Addington v. Jones*, 7 Jones, 582; *Topping v. Sadler*, 5 Jones, 357; *McDonald v. McCaskill*, 8 Jones, 158; *Williams v. Kivett*, 82 N. C., 110. In accord, *Holland & Briggs v. Overton*, 4 Yerg. (Tenn.), 482-488.

The plat of survey attached to the grant or government survey is competent to explain the *locus in quo*. *Steel's Heirs v. Taylor*, 3 Marshall (Ky.), 226; *Alexander v. Finley*, 5 Monroe (Ky.), 161; 2 J. J. Marshall, 162; 4 J. J. Marshall, 339; *Dyers v. Yates*, 1 Cald. (Tenn.), 136. See cited cases, 1 Meigs's Digest, 401.

deed, but a *marked* corner *was* established by *parol* ninety yards *below* the bridge. But in this case another question was decided. Suppose under this call "below the bridge" no actual marked corner had been found, what construction does the law place upon the call? It would begin *on the river immediately below the bridge*.

This was the construction of such a call in *Becton v. Chestnut*.^{*} There the call was "lying on Neuse," and "beginning at a hickory below the mouth of Beaver Dam branch," etc. In fixing the legal import of these words Ruffin, C. J., says: "We think it clear that the patent begins at K, or, in other words, on the river and *immediately below the mouth of the branch mentioned*."

Reference to other Patents, Deeds, or Plats.—If a deed, in order to a more perfect description, refer to another deed, patent, or plat, these papers to which reference is made may be looked to as a part of the description.[†]

In *Trumbull v. Schroeder*, *infra*, it was decided: "If a deed of a town-lot refer for description to a *recorded plat*, which purports to be a determination of a particular survey, the stakes and monuments set at the corners of the lots in making such survey are controlling monuments for locating the lot on the ground; where there is a shortage in the block, so that the measurements of the lots as given on the plat cannot be satisfied, and where such monuments have disappeared, it is competent to show by witnesses the points at which they were set."

Ambiguity in Deeds and Patents.—1. "When an expression has been used in an instrument of writing which may be understood in more than one sense, it is said there is *ambiguity*."

2. "There are two sorts of ambiguities of words, *ambiguitas latens* and *ambiguitas patens*."

3. "The first occurs when the deed or instrument is sufficiently certain and free from ambiguity, but the ambiguity is produced by something extrinsic, or some collateral matter out of the instrument; for example, if a man devise property to his cousin, A. B.,

^{*} See *Becton v. Chestnut*, 4 Dev. & Bat., 335.

[†] Doe on Dem. of Campbell v. McArthur, 2 Hawks (N. C.), 33; *Trumbull v. Schroeder*, Sup. Ct. Minn. See *Northwestern Reporter* for Jan. 21, 1882. See *Southern Law Review* for April and May, 1882.

and he has two cousins of that name, in such case, parol evidence will be received to explain the ambiguity."

4. "The second, or patent ambiguity, occurs when a clause in a deed, will, or other instrument is so defectively expressed that a court of law, which has to put a construction upon the instrument, is unable to collect the intention of the party. In such case, evidence of the declaration of the party cannot be admitted to explain his intention, and the clause will be void for uncertainty."*

Lord Bacon says: "*Ambiguitas patens* is never holpen by averment; and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow, and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. . . .

"But if it be *ambiguitas latens*, then otherwise it is; as if I grant my manor of S. to J. F., and his heirs, here appeareth no ambiguity at all. But if the truth be that I have the manors of South S. and North S., this ambiguity is matter of fact, and therefore it shall be holpen by averment whether of them it was that the party intended should pass."

Under this doctrine the courts are constantly called upon to admit parol evidence to explain a *latent* ambiguity, as in one of the cases heretofore cited,† where the call was for "Swift Creek Swamp," and it appeared that two points were called by the same name, so that it was held competent to show which point was intended by the call for "Swift Creek Swamp."

Under this rule, where the land is described as lying in one

* 1 Bouvier Law Dic., 97, and authorities cited; 1 Greenl. Ev., §§ 297, 298, 299, 300, and notes; Bacon's Law Tracts, 99, 100; see *Sargent v. Adams*, 3 Gray (Mass.), 72, 77, opinion by C. J. Shaw; Wigram on Interpretation of Wills, 174.

† *Brooks v. Britt*, 4 Dev. (N. C.), 481; *Reed v. Schenck*, 2 Dev., 415.

Sometimes, where the description is ambiguous or doubtful, the conduct of the parties, showing what construction they placed on the instrument, may be given in parol, as acts, occupancy, recognition of monuments or boundaries, etc.; *Stone v. Clark*, 1 Metcalf, 378; *Kellogg v. Smith*, 7 Cush., 375.

The expression of *quantity* is descriptive, and in doubtful cases this may aid in ascertaining boundary. 2 Johns., 37; 7 N. Hamp., 241; *Riddick v. Legatt*, 3 Murp., 539; *Hickman v. Tate*, Cooke (Tenn.), 460.

county, it may be shown to be in a different county, the *other* descriptions controlling.*

Extrinsic evidence is always admissible to explain the calls of a deed, for the purpose of their application to the subject-matter, and thus give effect to the deed; where monuments, for example, stakes and stones, or a tree, are referred to in a deed, parol evidence is admissible to show the location; "all facts relating to the subject-matter and object of a deed, such as, that the property comprised in it did or did not belong to the grantor, the mode of acquiring it, the local situations, limits, and distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the instrument."†

Evidence of the possession of settlers on adjacent tracts in reference to a *division* line, attempted to be shown as recognized by one of the parties to the suit, was held admissible.‡ This could be so on the grounds of estoppel *in pais*, perhaps.§

Uncertainty of Description.—It has been said that "*certainty* is the mother of repose, and therefore the law aims at certainty."

So, if the description of the land be so vague and uncertain that its meaning cannot be certainly collected by the court the deed is void, and the court will refuse to allow the same to be given in evidence.

But it is a maxim of law, "that is certain which may be made certain"—*certum est quod certum reddi potest*. And it is under

* See *Stringer v. Young's Lessee*, 3 Peters, 320; *Barclay v. Howell's Lessee*, 6 Peters, 498.

† *Beamer v. Nesmith*, 34 Cal., 624; *Hedge v. Sims*, 29 Ind. R., 574; *Closemont v. Carlton*, 2 N. H., 373; *Blake v. Doherty*, 5 Wheat. (U. S.), 359; *Waterman v. Johnson*, 13 Pick., 261; *Tenant v. Hampelton*, 3 Har. & Johns. R., 233; *Doe v. Martin*, 4 Barn. & Adolph. R., 785; *Clough v. Bowman*, 15 N. H., 504; *Owen v. Bartholomew*, 9 Pick., 520; *Tyler on Boundaries*, pp. 285-6.

‡ *Rockwell v. Adams*, 6 Wend. (N. Y.), 467.

§ In consequence of the statute of frauds: "Where the lines and boundaries of land are fixed, and can be identified, a *verbal agreement*, even by the parties interested, to fix lines and boundaries different, would not be binding. But where there is *doubt* as to the identity of the dividing lines the rule is different." *Tyler, Eject.*, 287; *McCormick v. Barnum*, 10 Wend. (N. Y.), 104; *Jackson v. Corlear*, 11 Johns., 123.

‡ *Baldwin v. Brown*, 16 N. Y., 359; *Tyler, Eject.*, 571-575. But see *Townsend v. Hoyt*, 51 N. Y., 656; *Reed v. McConet*, 41 N. Y., 435.

this maxim that by surveys and proof of extraneous facts, not in contradiction to the deed, what *appears* vague is often made sufficiently *certain*.

The description in a deed of "752 acres of land, including the land I now live on and 'adjoining' the same," was too vague to convey more than the lands lived on, when the grantor owned much more than 752 acres adjoining the land he lived on. It was held that, under such circumstances, "adjoining" could not be aided by *parol*.^{*} If, as has been stated, a description of the land in a deed is so vague and contradictory that it cannot be ascertained what is meant, the deed is void, but the different descriptions will be reconciled, if possible. Where a deed contains two conflicting descriptions of the granted premises, of equal authority, it seems that the one more favorable to the grantee will be adopted.[†] That description should be adopted which is least liable to be erroneous.[‡]

In order to get the intent of the parties the court may take into consideration the extrinsic circumstances, the situation of the parties, and the subject-matter of the controversy. This is the established rule of the common law. The intent of the parties should, if possible, be effectuated. The *usages* of the parties under the deed may be looked at.[§]

"In determining the boundary of land none of the calls must be disregarded when they can be fulfilled by any reasonable way

^{*} Robeson v. Lewis, 64 N. C., 734. See Finly v. Cook, 54 Barb., N. Y.

[†] Vance v. Force, 24 Cal., 435; 36 Penna., 24.

[‡] Miller v. Cherry, 3 Jones Eq., 24.

[§] Livingston v. Ten Broeck, 16 Johns. N. Y., 23.

The following cases in North Carolina hold that the *description* was too *vague* to be aided by *parol* proof: Murdock v. Anderson, 4 Jones Eq., 77; Allen v. Chambers, 4 Ire. Eq., 125; Capps v. Holt, 5 Jones Eq., 153; Grier v. Rhyne, 69 N. C., 346; Dickens v. Barnes, 79 N. C., 490; Edmondson v. Hooks, 11 Ire., 373; Robeson v. Lewis, *supra*; Smith v. Low, 2 Ire., 457; Blanchard v. Blanchard, 3 Ire., 105; Morring v. Lowe, 4 Ire., 38; Ward v. Sanders, 6 Ire., 382; Carson v. Ray, 7 Jones, 609; Stephenson v. Railroad Company, 86 N. C., 455.

As to when *parol* is allowed to explain, see cases of Farmer v. Batts, 83 N. C., 387; Young v. Griffith, 84 N. C., 715; Fish v. Hubbard, 21 Wend., 651; Hurley v. Brown, 98 Mass., 545; Mead v. Parker, 115 Mass., 413; Taylor on Boundary, chap. xxiii.; Fry on Specific Performance, Sec. 209; Wigram on Wills, 7; Greenl. Ev., § 283. As to *requisites of the description*, see St. Louis Bridge Company v. Curtis et al., 103 Ill., 410.

of running the lines, which will be *deflected* only when necessary to give effect to the *intent* of the parties expressed in the instrument.* In the case of *Long v. Long*, *infra*, the "beginning" was an ascertained point; "thence a direct line to Ramsey's Ford, so, however, as to include the *cleared part* of Shingle Island."

To have run a direct line between the *termini* would have excluded the island altogether. It was held that it must go to the "cleared part," around it, and thence to the ford, thus making this a bent and angular boundary, instead of a single straight line. In *Clark v. Wagner*, *infra*, the calls were for *termini* well ascertained, but the call was to "include two islands." The line was held to run a tortuous course in order to embrace both islands. The recent North Carolina cases and the other citations in the note fully illustrate the *extent* to which the court may go to effectuate the *intent* of the parties.

Controlling "Calls" in a Deed or Patent.—Where there are no natural boundaries called for, nor marked trees, nor corners to be found, nor the places where they once stood ascertained and identified by evidence, or where there are no lines or corners of an adjacent tract called for, the courses and distances specified in the deed or patent must be followed.†

In a case where the grant called for one thousand acres of land, and *no more*, yet, according to certain lines and well-defined metes and bounds, two thousand acres were included and passed under the grant, the quantity stated is immaterial, except in cases where the boundary is doubtful.‡

The terminus of a line must be either the distance called for in the deed, or some permanent monument, which was erected contemporaneous with the execution of the deed. A stake is not

* *Miller v. Bryan*, 86 N. C., 167, citing *Long v. Long*, 73 N. C., 370; *Clark v. Wagner*, 76 N. C., 463; *Tyler on Boundary*, pp. 29, 119, 176, 187; *Salisbury v. Andrews*, 19 Pick. (Mass.), 253; *Hayes v. Askew*, 8 Jones Law, 226; *Hicks v. Coleman*, 25 Cal., 122; 35 Mo., 494; *Jackson v. Beach*, 1 Johns. Cases, 399; 3 Johns. R., 388; *Wolf v. Scarborough*, 2 Ohio, 361; *Hammer v. Smith*, 22 Ala., 433; *Peyton v. Ayers*, 2 Md. Ch. R., 64; *Calkins v. Lavelle*, 44 Vt., 230; *Cadman v. Evans*, 1 Allen (Mass.), 446; 2 Washburn Real Property, 627; *Whitney v. Olney*, 3 Mason, 280; *Hill v. West*, 4 Yeates, 142; 8 Allen, 235.

† *Cherry v. Slade*, 3 Murph., 82.

‡ *Reddick v. Leggett*, 3 Murph., 539.

such a monument, and evidence of its erection, when the land was surveyed, is not admissible to control the course and distance.*

Then, again, course and distance from a given point contain a certain description in themselves, and therefore should never be departed from, unless there be something else which proves that the course and distance stated in the deed were so stated by mistake.†

Where the grant calls for the line of an old survey, it must go to it, unless a natural object or marked tree is called for. Before the junior grant can be ascertained those of the old must be located.‡

When "stakes" are mentioned in a deed simply, or with no other added description than that of course and distance, they are intended by the parties, and so understood, to designate imaginary points.§

Where the beginning call in a grant is for a stake, and all the other calls are for a course and distance, the location of the land is impossible, because the beginning being at a stake, an imaginary point, it cannot be identified.||

The calls for course and distance may be controlled principally in three ways:

1. By calls for well-defined and established "monuments," made at the time of the execution of the deed, or of the original survey upon which the grant is issued (called natural boundary).¶

2. In the cases mentioned, where such lines or corners were established and marked in like manner at the time, but not called for in the deed, provided these marked lines are sufficiently certain to include the land.**

3. By calls for the line of another tract, or the corner of an-

* *Reed v. Schenck*, 3 Dev., 65.

† *Harry v. Graham*, 1 Dev. & Bat., 76; *Ring v. King*, 4 Dev. & Bat., 164; *Norcom v. Leary*, 3 Ire., 49. See the important Maryland case which decides several nice questions of boundary, *Wilson v. Enloes*, 6 Gill's (Md.), 121.

‡ *Dula v. McGhee*, 12 Ire., 332; *Tyler on Boundary*, chaps. 21-23.

§ *Massey v. Belisle*, 2 Ire., 170.

|| *Mann v. Taylor*, 4 Jones, 272; in accord, *Archibald v. Davis*, 5 Jones, 322.

¶ *Cherry v. Slade*, 3 Murph., 82; *Tatum v. Sawyer*, 2 Hawks, 226; *McNeil v. Massey*, 3 Dev., 520.

** *Icehour v. Rives*, 10 Ire., 256; *Graybill v. Powers*, 76 N. C., 66.

other tract, if that line or corner was well known or established at the time of making the deed or survey thus making the call.* Strictly, these are all calls for natural boundary; each controls the call for course and distance where there is a conflict. In other words, they are varieties of natural boundary.

So it will appear that every call in a grant or deed does and may serve a purpose in getting at the intention of the parties. Course and distance, in the absence of doubt and conflict, are self-controlling and sufficient; but, when it appears that a *conflict* in the calls exists, then some rule has to prevail in order to prevent a total failure of the deed. Thus the call is *north 100 poles to a black oak*. Now the black oak is found, *marked and well identified*; but, in order to reach the black oak from the preceding call, it is necessary to run *north 20 east 120 poles*. Now which controls? Obviously the party has a right to go to the black oak, although 20 poles further than the call, and the real course being north 20 east. So if the call be for any other natural boundary. So, likewise, if the *marks and lines* are made at the time, and not called for in the deed. The ground upon which this ruling is based is simple and reasonable. The calls are inconsistent; and, there being a mistake, it is more probable that a mistake was made in the field-notes than in the deliberate act of marking a tree or running a line, as the case may be.

Admissions of the parties that a particular line was the true one between the tracts, and acts of ownership up to it by the claimants on both sides of it, do not, *per se*, tend to show a marking and establishing the same contemporaneous with the making of the deed or survey in the grant.† The *line* called for will control course and distance, whether such line be marked or unmarked.‡

As we have seen, these facts tending to show boundary may be established by reputation and hearsay. But we omitted, while under that head, to refer to a few special qualifications in the rule

* *Graybill v. Powers*, 76 N. C., 66; *Finly v. Dobson*, 8 Jones; *Carson v. Barnett*, 1 Dev. & Bat., 546; *Gilchrist v. McLaughlin*, 7 Ire., 310; *Gause v. Perkins*, 2 Jones, 222; *Corn v. McCrary*, 3 Jones, 496; *Campbell v. Branch*, 4 Jones, 313; *Casler v. Fite*, 5 Jones, 424.

† *Caraway v. Chancy*, 6 Jones, 361. Same principle in *Rodman v. Gaylord*, 7 Jones, 262.

‡ *Corn v. McCrary*, 3 Jones, 496.

admitting reputation in questions of boundary, which, if they do not affect the competency, do affect the weight of the evidence. In *Mendenhall v. Cassels** it is said: "In this country traditional evidence is received in regard to *private* boundary; but we require that it should have something definite to which it can adhere, or that it should be supported by proof of corresponding acquiescence or enjoyment.

"A mere report, or neighborhood reputation, unfortified by evidence of enjoyment or acquiescence, that a man's paper-title covers land, is too slight and unsatisfactory to be received as evidence in questions of boundary."

There is this difference between *reputation* and *hearsay* in reference to boundary: In proof of *reputation* old grants or deeds calling for particular lines or corners may be admitted as evidence of the existence of such lines and corners, whether the parties to such old grants or deeds be living or dead. But in *hearsay* the persons making the declarations must be dead before they can be made competent evidence.† Other qualifications of the rule allowing hearsay in these questions have already been noticed.

Legal Construction of certain Calls, as held by the North Carolina Courts.—"To or near" "the head of Middle Spelling Creek" indicates no old line, and is too uncertain to control the call for course and distance.‡ So in the case of *Cansler v. Fite*,§ the call was "to a Spanish oak 'in or near' Richman's line." The tree called for could not be found, and course and distance governed.

A grant of land, bounded in terms by a river or creek not navigable, carries the land of the grantee *usque ad fitem aquæ*, that is to the middle or thread of the stream.||

A call for "up the river" is equivalent to a call "*with the river*."¶

* *Mendenhall v. Cassels*, 3 Dev. & Bat., 49.

† *Dobson v. Finly*, 8 Jones, 495; *Spear v. Coate*, 3 McCord, 227; 6 Binney's Penna. R., 59; 1 Cowan & Hill's Notes, 633-4; Tyler on Boundary, 305.

‡ *Mizzell v. Simmons*, 69 N. C., 182; *Harry v. Graham*, 1 Dev. & Bat., 76.

§ *Cansler v. Fite*, 5 Jones, 424. In accord, *Kissam v. Gaylord*, Busbee N. C., 116; *Spruill v. Davenport*, Ibid., 134.

|| *Williams v. Buchannon*, 1 Ire., 535.

¶ *Rogers v. Mabe*, 4 Dev., 180.

This might be changed by showing a marked line different from the meanders of the stream, etc.

Where the deed contains a double description "along the river" and a "marked line," the river is the more important description and will control the marked line.*

When a grant calls for a corner of another lot, but leaves it in doubt which of two particular corners is meant, the second call of the grant may be resorted to for the purpose of removing the uncertainty and ascertaining which of the two was intended.†

When the thing called for is of an extended character, such as another tract of land, a river, or swamp, the line must be run to the nearest point of it, irrespective of course and distance.‡

Where a deed described a corner which had been marked as being on the *east* side of a creek, it is admissible to prove that it was in fact on the *west* side of the creek.§

A "white (— blank)" was called for as a corner; it was held not a case of latent ambiguity, but of *imperfect* description, and it was left to the jury to say whether a *white oak* found nearly in the course by a marked line leading to it was the corner intended.|| It was also held in this case that as a means tending to find the *beginning* corner, the second being found, the course could be *reversed* from this second corner.¶

A call "up the creek" means, ordinarily, a line to run with

* *Lynch v. Allen*, 4 Dev. & Bat., 62.

† *Hough v. Dumas*, 4 Dev. & Bat., 328.

In this State the ebb and flow of the tide is no rule for determining whether a river is navigable or not. So a stream eight feet deep and sixty yards wide, with unobstructed navigation to the sea, is a navigable stream, and its edge at low-water mark is the boundary of adjacent land. *Wilson v. Forbes*, 2 Dev. R., 30; *Ingram v. Threadgil*, 3 Dev., 59.

‡ *Campbell v. Branch*, 4 Jones, 313. § *Hauser v. Belton*, 10 Irs., 358.

|| *Dobson v. Finly*, 8 Jones, 495.

In the case of *Nash v. Wilmington & Weldon R. R.*, 67 N. C., 413, where the deed called for certain lots in Wilmington by *No.*, and also called for certain streets in the city, and a discrepancy not being practical to fit the *No.* of the lot to the *street* called for, it was held that the call for the lot by *No.* should control and the street be disregarded. C. J. Pearson cited no authority, but put the decision upon the reason of the case.

¶ The word "by" when descriptively used in a grant does not mean "in immediate contact with," but "near" to the object to which it relates; and "near" is a relative term, meaning, when used in land patents, very unequal and different distances. *Wilson v. Juloes*, 6 Gills. R. (Md.), 121.

the creek.* The call for "the bank" of a creek does not convey the land to the centre of the creek, but only to low-water mark.†

Boundary is a question of fact, or at least of law and fact combined, and is to be decided by the jury and not the court, and questions of boundary, like other questions of fact, depend upon their own particular circumstances, where every shade of evidence and even the most minute circumstances, may produce its effect. The artificial rules respecting boundary are intended only as guides in the application of circumstances, and not as fixed laws to be applied indiscriminately in all cases.‡

In questions of boundary, as in others, it is the province of the court to expound the law to the jury. Says Mr. Tyler :§ "As a general proposition it may be affirmed that boundary may be proven or established by every kind of evidence which is admissible to establish any other fact, and, under certain circumstances, a species of evidence may be admitted in these which might not be proper in ordinary cases. When the description of the boundary is in writing, as is most usually the fact, the instrument is first to be examined, and when that is clear there is but little difficulty in the case except to locate it upon the ground."||

* 10 Ohio R., 508.

† 13 N. Y., 296 ; 56 N. Y., 526 ; 11 Ohio, 311.

‡ Orbison v. Morrison, 3 Murph., 551.

§ Tyler on Boundaries and Fences, p. 281.

|| NEW YORK CASES, INCLUDING THE LATEST.—"Any visible defined object fixed upon by the terms of the grant as the boundary or location call of the premises, such as a marked tree or clearing, the corner of a lot or the land of another person which is *certain* and *notorious*, must be adhered to in the location of the grant, although it does not correspond with the course, distance, or quantity, which must all give way to such known boundaries." Jackson v. Widger, 7 Cow., 723 ; Wendell v. The People, 8 Wend., 183.

"When the *courses, distances, and quantity* of land contained in a grant correspond with the natural or artificial monuments or boundaries given, it is immaterial at what angle of the premises a survey is commenced ; but where a practical location cannot be made to correspond with *all* the *calls* in the grant, it is necessary to run around the premises in the direction indicated by the description in the grant, especially where some of the angles of the lot are not marked by natural or artificial monuments." Wendell v. The People, 8 Wend., 183.

"Where it appears on the face of the deed that courses and distances from a fixed and determined line were intended to control instead of the monuments referred to, the latter will be disregarded." Buffalo, New York & Erie R. R. Co. v. Stigeler, 61 N. Y., 348. See also 9 Hun. N. Y., 1 ; 72 N. Y., 94.

A deed describing the boundary of the premises as "running along" a street does not convey the fee to its centre, if the *termini* of the boundaries are stated

Of Lands Bounded by the Sea or Navigable Streams.—The right of soil of owners of land bounded by the sea or navigable rivers,

to be on the side of the street." *Patten v. New York Elevated R.R. Co.*, 3 Abb., 306; *Brightly's Digest*, 4718.

Amount Conveyed.—Boundaries in deed, giving accurate description, where permanent and capable of being ascertained, will govern as to amount of land conveyed. *Jones v. Smith*, 73 N. Y., 205.

At.—"At" a tree does not necessarily mean the centre of the tree. *Stewart v. Patrick*, 68 N. Y., 450.

Adjoining Owners.—A practical location of the dividing line between lands of adjoining owners, with a long acquiescence therein, will not be disturbed. *Avery v. Empire Woollen Co.*, 82 N. Y., 582.

Centre of Lane.—The presumption of intent to convey to the centre does not attach where the boundary is a lane running through the lands of the grantor, with no connection with lands granted, and not necessary to the use thereof. *Mott v. Mott*, 68 N. Y., 247.

Centre of Stream.—The question as to whether a title passes to the centre of a stream not navigable is one of intent, to be gathered from the description, situation of land, etc. *Idem*.

Calls in the Deed.—The rule that the boundaries of land conveyed must be determined by the calls in the deed, when definite and distinct, applied. *Lawrence v. Palmer*, 71 N. Y., 607.

Division Fence.—The fact that a division fence had been kept up for more than twenty years by agreement, is sufficient evidence to fix it as the boundary. *Jones v. Smith*, 64 N. Y., 180.

Monuments.—Where monuments existing at the time of a conveyance are referred to therein, and have since disappeared, parol evidence of their location is competent. *Robinson v. Kime*, 70 N. Y., 147.

Not Inflexible.—The rule that the description in a deed must yield to natural or artificial monuments, called for by the grant, is not inflexible, and if the description shows the courses and distances are right, they will prevail. *Higinbotham v. Stoddard*, 72 N. Y., 94.

LEADING ILLINOIS CASES—OTHER STATES.—For a full discussion of the proper methods of running interior and exterior lines, effect of monuments, original corners, with a view of the effect of the meridian's convergence towards the north, and the true and magnetic poles, see *Colvin et al. v. Fell et al.*, 40 Ill., 418.

The declarations of persons who have since died, but who had peculiarly good means of knowledge on the subject, made when they had no interest in misrepresenting the truth, on questions of landmarks and boundaries, or as to the place of a government corner, are admissible as evidence. *Noble v. Chrisman*, 88 Ill., 186.

Monuments established by the surveyor, at the time of making the survey, will always prevail over written descriptions when a contradiction exists. *People v. Stahl*, 101 Ill., 346, citing 80 Ill., 268; 93 Ill., 116.

If there be two descriptions in a deed of the land conveyed, and they do not coincide, the grantee is at liberty to elect that which is most favorable to him.

where the tide ebbs and flows, extends only to high-water mark. In England the crown, and in this country the people, have the

Sharp v. Thompson, 100 Ill., 447; see also Helm's Lessee v. Howard, 2 H. & McH., 57.

In a conveyance of land it is not necessary that it should be called by any particular name, but it will be enough if the description is such as to identify the property. Critical accuracy in the description is not necessary. Bowen v. Galloway, 98 Ill., 41; Village of Byron v. Blount, 97 Ill., 62.

Property assessed for taxation must be described by reference to government surveys, or by metes and bounds. If designated as a *lot*, when there is no plat to which reference is had to determine from what tract it has been formed, no judgment can be rendered against it for taxes, being incapable of location. People v. Chicago and Alton R.R. Co., 96 Ill., 369.

A description of land in a patent of the United States as "the west half of the southwest quarter of section 9, in township 15 north, range 10 west, in the district of lands offered for sale at Springfield, Illinois," is sufficiently certain. Mapes v. Scott, 94 Ill., 379; see Cornwell v. Cornwell, 91 Ill., 414, as aiding a defective description by extrinsic facts.

Courts will take notice of the meaning of *initials* used in the description of land in this State, in conveyances, levies of execution, judicial sales, surveys, assessments for taxes, etc., without further proof. Kile v. Town of Yellowhead, 80 Ill., 208.

Although title to real estate cannot be transferred by *parol*, yet it is well established that owners of adjoining tracts of land may, by *parol* agreement, settle a line, and when followed by possession according to the land agreed upon, is binding and conclusive. Cutler v. Callison, 72 Ill., 113; Kerr v. Hitt, 75 Ill., 51; Hubbard v. Stearns, 86 Ill., 35; 82 Ill., 498.

The location is not always determined alone by the description in the deed, independent of extrinsic proof; the deed describes the objects bounding the premises, but *parol* evidence is usually resorted to for the purpose of identifying the objects themselves. Williams v. Warren, 21 Ill., 541.

Where fractional pieces of land are patented, bounded in part by a stream or bayou, and there is a dispute as to the boundaries, the original plat or a copy thereof may be resorted to; the lines as originally run will control. McCormick v. Huss, 78 Ill., 363. On questions of boundary in this State, see also 73 Ill., 453; 25 Ill., 163; 24 Ill., 367; 5 Gilm., 548; Hill's Ill. Digest, vol. i., 357.

Parties will not be bound by an intervening fence, as a boundary dividing their lands, where they claim only to the extent of their paper title, whatever that may be, and the fence is suffered to remain simply as a matter of convenience. West v. St. Louis, K. C. & N. R.R. Co., 59 Mo., 510; Jones v. Smith, 3 Hun. (N. Y.), 351; see 41 N. Y., 435.

Where a person has sold land up to a certain line, pointing it out as the true line, and inducing another to buy it, he is estopped to deny that it is the line between his own and the adjoining land. 41 N. H. R., 380; 51 Me., 575; Wilson v. Hudson, 8 Yer. (Tenn.), 398; Boyd v. Graves, 4 Wheat., 513.

Parol agreement respecting a boundary, made while a party is only an oc-

absolute proprietary interest in the shores of these waters, though it may, by grant or prescription, become private property.* The

capant without title, cannot be binding upon him after he acquires the fee. *Crowell v. Maughs*, 7 Ill., 419; 9 Hump., 76.

A line to run parallel with and at a specified distance from the south side of a building, should be measured from the corner-board of that side, and not from the outer edge of the eaves. *Proprietors, etc., v. Hotel Co.*, 51 Me., 413; and by the same court it is held, that the words "from" an object, or "to" an object, used in a deed, excludes the terminus referred to. *Bonney v. Morrill*, 52 Me., 252.

Leading Tennessee Cases.—The courts will resort to any indications, however slight, to fix the locality of land, rather than allow a right to be lost by uncertainty. *Williamson v. Buchannon*, 2 Tenn., 278; *Houston v. Pillow*, 1 Yer., 488; in the absence of other means, *quantity* will be resorted to, 1 Tenn., 297.

An actual survey is not necessary to the ascertainment of boundary. If so described in the grant that it can be identified, this is sufficient. *Ramsey v. Monroe*, 3 Sneed, 329.

If by any means the beginning corner be satisfactorily shown, the same shall prevail, though not marked. *Rucker v. Vaughn*, Peck (Tenn.), 272.

If a line be actually run and marked by the surveyor, as the boundary, it will control a call for natural objects, though called for specially. *Massengill v. Boyles*, 4 Hump., 205; *Martin v. Vance*, 3 Head., 649; *Smith v. Jones*, 3 Sneed, 533; see also, *Massengill v. Boyles*, when again before the court, 11 Hump., 112.

The marking (at the time of the survey) must have the usual designations on the trees, or other distinct and reliable indications, showing with reasonable certainty to the inquirer that it was a boundary line. *Mayes v. Lafferty*, 1 Head., 60.

A call for a tree on the river-bank, thence down the river to another tree on the bank of the river, will follow the meanders of the river. *Massengill v. Boyles*, 4 Hump., 205; 2 Hawks (N. C.), 218; 2 Dev., 415; 3 Dev., 65.

Where a call was 894 poles to a stake, crossing Duck River, though the distance gave out one mile and eight poles short of the river, it was held that the line must be extended to the bank on the opposite side of the river. *Singleton v. Whiteside*, 5 Yer., 18; 2 Hump., 264.

The variation at the time of the surveys may be ascertained from experiments with contemporaneous surveys of other grants or tracts in the same vicinity, and the same variation allowed on lines thus ascertained. *Houston v. Pillow*, 1 Yer., 481.

A call for a navigable stream carries the boundary to low-water mark. Where the stream is not navigable, to the middle of the stream. *Martin v. Vance*, 3 Head., 649; 2 Swan., 9-13.

Parol evidence is not competent to aid an entry, vague and indefinite on its face, when it is necessary that it be a *special entry*. *Barnes v. Sellers*, 2 Sneed, 33.

Acts and declarations of a former owner, made or done when he was owner,

* Tyler on Boundary, 39-40, and authorities cited in chapters ii. and iii.; *Bowman's Devisees v. Mathen*, 2 McLean, 376.

"seashore" is that ground which lies between the ordinary high-water mark and the low-water mark; or, in other words, the space between high and low-water mark.

especially if accompanied with possession, are admissible as evidence of boundary. And this is so, whether he be alive or not, and whether he is admissible as a witness or not. *Davis v. Jones*, 3 Head., 603.

Evidence of *admissions* in questions of boundary should be clear and unequivocal. It is always a suspicious kind of evidence. *Polk v. Robertson*, 1 Tenn., 456; *Peck*, 148. See *Spears v. Walker*, 1 Head., 166.

Proof is admissible to show that a particular line and tree was *reputed and known* as the line of a grant, for the purpose of establishing a tree *not* called for as a corner, instead of a stake, and at a point beyond the distance. *Holland v. Oberton*, 4 Yer., 482.

Where a spot is called for, as the place where a party crossed Elk River in 1781, the place may be proved by declarations of persons who were of the party, but are now dead. *Beard v. Talbot, Cooke*, 142.

A plat and certificate is highly persuasive evidence of the locality of land, but is not absolutely conclusive in a case where there is clear proof of the lines and corners originally surveyed and established; but in the absence of such proof it would be controlling. *Tate v. Gray*, 1 Swan., 73; *Hickman v. Bell*, 6 Hump., 398; *Childress v. Holland*, 3 Hay., 274; *Mayes v. Lafferty*, 1 Swan., 60.

Lines omitted in the calls of the grant may be supplied by the plat. 1 Cold. (Tenn.), 136.

As to presumption from acquiescence and estoppel, see *Merriwether v. Lanman*, 3 Sneed, 447; 2 Sneed, 689; 3 Head., 603.

Although regular surveyors are appointed by authority of the government, as the proper officers to make surveys, yet a survey made in good faith by another person, will be good and valid. Under some circumstances a survey, made by the grantee himself or other person in interest, is good and available to establish boundary, if made with reasonable conformity to the grant. *Houston v. Pillow*, 1 Yer., 481.

(Chief Justice Marshall, in *Taylor v. Brown*, 5 Cranch U. S., 234, held the same, and that a deputy or assisting surveyor was competent to make a plat and survey in obtaining the early title in Virginia and Kentucky, although the law in *terms* applied to the chief surveyor.)

The object of a resurvey is to ascertain the lines as originally made. *Gilchrist v. McGee*, 9 Yer., 458. See 1 Swan., 138.

The Tennessee Act of 1806 allowed persons claiming under titles derived from North Carolina or Tennessee to cause the same to be processioned. The surveyor was required to run and mark such lands agreeably to former lines or natural boundaries described in the applicant's paper title. Or, if such lines had not been marked, to mark new lines, agreeably to the calls of such title, etc., make plat and certificate, and return to the register of the county. In case of contest after notice, the sheriff was required to summon a jury, whose decision was to guide the surveyor.

Many questions arose under this legislation, such as the *conclusiveness* of these

As a general, common-law rule, all the shore below ordinary high-water mark belongs to the sovereign power of the state.* This rule applies to all arms of the sea.

surveys, the constitutionality of the same, the modes of *following the statute*, etc., *acquiescence*, etc. The questions may be found in *Chouning v. Simmons*, 5 Hump., 299; *Singleton v. Whitesides*, 5 Yer., 18, 38, and other cases collected in *Heiskell's Digest*, 319, 322.

The act gave rise to many nice questions of land law, but has doubtless been productive of much good in settling doubtful boundaries. See a late case on the subject of resurveys, estoppel, etc., *Caruthers v. Crockett*, 7 Lea, 91.

The plat annexed to the grant is not an essential part of it, but if received, must be for explanation, and not to destroy it. *Polk v. Hill*, 2 Tenn., 113.

General or directory calls yield to *special or locative* calls. Calls for *course and distance* are always special and locative; but not as determinately so as calls for *natural or artificial* objects, whose locality is well established. When such natural or artificial objects are called for as special and locative, then they control calls for course and distance. But where natural objects are called for as general or directory, that is, as intended to lead to the neighborhood, but making no pretensions to precise accuracy, then they are themselves controlled by calls for course and distance, these being always special and locative. *Roberts v. Cunningham*, M. & Y., 67; *Wright v. Mabry*, 9 Yer., 55.

In the first of these cases the land was described as lying on the *south* side of Cumberland River, but surveyed according to course and distance, it was found to lie on both sides of the river; and the court held that the calls for course and distance controlled the general or directory call for the *south* side of the river.

In the second case, the land was to lie on *both* sides of a certain creek; but the special boundaries called for, running the lines according to course and distance, placed it all on one and the same side of the creek; and here, again, the calls for course and distance prevailed over the calls for natural objects. And this, in both cases, for the same reason, namely, *that the special objects or calls constituting boundary must control the more general and indefinite description*. *Whitesides v. Singleton*, Meigs R., 207; *Newson v. Pryor*, 7 Wheat. U.S., 7. The case of *Newson v. Pryor*, opinion by Ch. J. Marshall, was on a writ of error from the District of West Tennessee. He discusses the rule in that large class of cases where the surveyor simply made a beginning corner and did not actually run the land, but returns a plat covering the land intended to be acquired.

He held that it was too late now to disturb such surveys, and adopted the Tennessee rule, as stated from the cases above.

"Calls" are divided into two general classes: the calls for the county or other district of country,—a valley, for example,—in which the land lay; and the

* *Martin v. Waddell*, 16 Peters U. S., 367; *Pollard v. Hagan*, 3 How., 212; *Storer v. Freeman*, 6 Mass. R., 435; 3 Kent's Com., 514; *Smith v. Maryland*, 18 How., 71; *Arnold v. Munday*, 1 Halstead (N. J.), 1; *Angell on Tidelwaters*, 158.

"What is regarded as high-water mark is the line of the medium high tide between the springs and the neaps, and does not extend to land overflowed only at spring tides." "When the Revolution took place the people of each State became themselves sovereign, and in that character held the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since accorded by the Constitution to the General Government."*

The common-law doctrine, as to what constitutes the *shore* of the sea, is recognized in the American States,† which is *the space between high and low-water marks*.‡

What is a Navigable River?—The common-law criterion of a navigable stream, is the flow and reflow of the tide. The civil-law criterion is the capability and suitableness of the stream for

calls for the watercourses, mountains, and remarkable places nearest the land, were denominated *directory* calls, because they pointed out, not the land itself, but the neighborhood of the land, the *direction* in which it was to be sought.

The calls for the watercourses, lakes, ponds, and remarkable places within the land, and the calls for its boundaries, were termed *locative* calls, because they *located* a certain spot, or designated the very land intended to be appropriated. See King's Tenn. Digest, vol. ii., p. 1397.

As to the practice and contests between parties where a *caveat* is entered under the Act of 1806, see the cases cited in King's Digest, title Land Law, vol. ii.

Where alluvial accretions are made from the bank extending into the river, the title vests in the riparian proprietor. Posey v. James, 7 Lea, 98, citing County of St. Clair v. Lovington, 23 Wall. U. S.; 10 Peters, 662; 4 Monroe (Ky.), 62. See, also, 1 Lea, 704.

Where a grant relied on calls for a corner and line of another tract, the locality may be shown by parol, without producing the grant to the lines of which the call is made. Hughlett v. Conner, 12 Heisk., 83.

* Authorities, *supra*.

† Storer v. Freeman, 6 Mass., 435; Cutts v. Hussey, 15 Me., 237; City of Galveston v. Menard, 23 Tex., 349; Wait's Actions and Defences, vol. i., p. 710.

‡ It has been held by the Supreme Court of the United States that, in consequence of the special provisions for the survey of the public lands belonging to the United States, the call in the survey for the meanders of a stream does not carry the owner to the middle of the stream, but will stop at the same.

Congress, by the Act of 20 May, 1785, provides for the survey of the public lands into townships of six square miles, by lines running north and south, and other lines crossing the same at right angles. And that the object of calling for the meanders of the stream is to determine the *quantity*, etc. Railroad v. Schurmeir, 7 Wall., 272.

purposes of navigation in the ordinary state of the water. And by the civil law the bed of such a river is in the public, but the soil itself belongs to the owners of the banks on each side.

But this is not the test of the navigability of our American rivers. The *test* here is their *navigable capacity*.

"Those are public navigable rivers in law which are navigable in fact."*

But, while the beds of these navigable streams do belong to the States, they may grant proprietary interest in them to individuals. The statute of New York authorizes the commissioners of the Land Office to make grants of land under water in all the navigable rivers of the State, and in the bay and harbor of New York. In Connecticut, and perhaps others of the States, by usage and the law of that State the proprietors of land adjoining to a navigable river have the exclusive right to the soil between high and low-water marks for the purpose of erecting wharves and stores thereon.†

In Tennessee the civil-law criterion is adopted.‡ In this State it is held that a river may be navigable in the ordinary acceptation of the term and yet not navigable in a legal or common-law sense; and such is a river or stream of sufficient depth naturally for valuable floatage, such as rafts, flatboats, and small vessels of lighter draft than ordinary. It was also held that, if a river or stream be navigable in the legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. If it be navigable only in the ordinary sense, the ownership of the bed of the stream is in the riparian proprietors, and the public have an easement therein for the purposes of transportation and commercial intercourse.

But if the stream be so shallow as to be unfit for such purposes of transportation and commerce, the right both of property and use is wholly and absolutely in the owners of the adjoining land.

Riparian Owners.—The difference between a navigable and non-navigable stream has been noticed; also the common-law rule, and that adopted in this country, being more like the rule of the civil law. The riparian owners on the navigable stream,

* *Daniel v. Ball*, 10 Wall. U. S., 557; *Tyler on Boundaries*, 46.

† 7 Conn. R., 186.

‡ *Stuart v. Clark*, 2 Swan, 9.

or below the ebb and flow of the tide, hold to the high-water mark, while the whole bed of the stream belongs to the public. But at common law a riparian proprietor, bounded by a stream above the ebb and flow, or by a stream not navigable, owns the land to the centre or thread of the stream, and the public have the right to use the stream for the purposes of navigation; but in other respects the right of the riparian proprietor to the sole use is perfect. "That is to say, where a private or tideless river separates the lands of two riparian owners, the line of demarcation between the two estates is presumed *prima facie* to coincide with the *medium filum* of the stream, *medium filum aquæ*."* But neither can, by constructing docks or making excavations on his side, abridge the exercise of the rights of the opposite owner.† *Sic utere tuo ut alienum non lædas*.

"So, if the course of the stream should be diverted permanently, the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them, up to what was the *medium filum aquæ*, in the same way as they were entitled to the adjoining land.‡ It has been held that, if the course of a river not navigable changes and cuts off a point of land on one side, making an island, such island still belongs to the original owner. In such case, if the old bed of the river fills up and new land is formed, such newly-formed land belongs to the opposite riparian proprietors respectively to the thread of the old river."§

Judge Kent says: "Grants of land bounded on rivers, or upon the margins of the same, or along the same, above tide-water, carry the exclusive right and title of the grantee to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or right of passage, subject to the *jus publicum*, as a public highway."|| This is the holding in most of the States; it is the common-law doctrine.¶

* *Wright v. Howard*, 1 Simmons & Stuart R., 203; *Tyler on Boundary*, 49.

† *Walker v. Shepardson*, 4 Wis., 486.

‡ *Tyler on Boundary*, 49; cases cited.

§ *Trustees, etc. v. Dickinson*, 9 Cush. (Mass.), 544. || 3 Kent Com., 515.

¶ See *Morgan v. Reading*, 3 Smedes & Mash. (Miss.), 366, in which it is held that the title of the riparian proprietors on the Mississippi River ex-

In a very recent case in New York the general rule is affirmed in the following pointed language: "When lands are granted bounded upon a highway or stream not navigable, unless by the terms of the grant, or by necessary implication, the highway or the bed of the stream are excluded, a title will pass to the centre of the highway or stream. The reason is obvious. Ordinarily, in a conveyance of that kind, there is no purpose to be served in the retention by the grantor of a narrow strip of land along the boundaries of the land conveyed, and between it and the lands of other proprietors, or in the bed of a stream, and the intent to grant them will, therefore, be presumed by a conveyance of the adjacent lands bounded 'by' or 'upon,' or 'along' such highway or stream, or other equivalent phrases. But, they say, it being a question of *intent*, the intent to exclude the highway or bed or the river will not be presumed, but must appear from the terms of the deed, as interpreted and illustrated by surrounding circumstances."*

The term "navigable" is used as a technical term when applied to rivers, and that fresh-water rivers above the flow of the tide are not navigable within the meaning of the common law.

"The individual who owns the land on both sides of the fresh-water river owns the bed of the river; but if bounded on one side of the river he owns to the centre," says Mr. Tyler. "This is certainly the doctrine in regard to individuals as between each other, and the highest courts of several of the States have held that the same doctrine applies in all cases where the State is a party, except in those instances where the State, in granting lands on navigable fresh-water rivers, or even those not navigable, may

tends to the middle of the stream (or that portion above tide-water). See also *The Canal Appraisers v. The People*, 17 Wend. (N. Y.), 571; 26 Wend., 404. This is the doctrine as to individuals, but where the State is a party there are many decisions to the contrary. See 2 Binney (Penna.), 475; 14 Serg. & R., 71; 42 Penna., 219; 2 Porter (Ala.), 436; 17 Ala., 780.

* *Mott et al. v. Mott et al.*, 68 N. Y., 246, and authorities cited. See the authorities collected on questions of *boundary* by Mr. Wait, on *Actions and Defences*, vol. i., chap. 29, pp. 707-721. See a large collection of the authorities on the question of boundary, as applied to streams of all kinds and highways, by Thompson, in his treatise on *Highways* (1881), pp. 1-69 (revision by Mills); also the following Illinois cases: 47 Ill., 384; 58 Ill., 506; 53 Ill., 19; 78 Ill., 363; *Phillips v. People*, 55 Ill., 429; 52 Ill., 373; *Middleton v. Prichard*, 3 Scam., 510 (Illinois Digest, vol. i.).

have studiously avoided granting the river itself or the bed of the river, anticipating that the same might be wanted for public purposes.

"The States, however, are by no means unanimous in respect to the rule."* Thus in Pennsylvania it is held that the common-law rule that fresh-water rivers belong to the riparian owners does not apply to the Susquehanna and other large rivers of that State. Such rivers belong to the State, and no exclusive rights of fishing have been granted by the State to the owners along the banks, the riparian right only extending to low-water mark.† They hold in Pennsylvania, as in many other States, the common-law quality of whether the water was salt or fresh had no applicability to the great American rivers; but the true test was whether the river was or not navigable in fact.‡ In North Carolina the space between the high and low-water marks is not subject to entry by the laws of the State, but the legislature may grant certain rights and privileges to the same.§

The Difference between Riparian Owners and the Grantee of the Bed of the Stream.—In certain streams not navigable in the technical sense nor navigable in fact, the States issue a grant for the bed of the stream, in which case the grantee has the absolute title, and if the State should attempt to open the same for some public and practical purpose, as to allow fish to pass up, the owner is entitled to compensation, as in other cases of the condemnation of private property for public use.||

But the riparian owners as between themselves own to the middle of the stream, but the public has an easement in all cases where the stream can be used for floating even rafts and small boats. So if the party has permission to build a toll-bridge the leg-

* Tyler on Boundary, 53.

† Carson v. Blazee, 2 Binney, 475; 14 Serg. & R., 71, *supra*.

‡ Flanagan v. Philadelphia, 42 Penn., 219; Monongahela Bridge Company v. Kirk, 46 Penn., 112; Bird v. Smith, 8 Watts, 434. See in accord, Bullock v. Wilson, 2 Port. (Ala.), 436; Rhodes v. Otis, 33 Ala., 578; Collins v. Benbury, 3 Ire. (N. C.), 277; Wilson v. Forbes, 2 Dev., 30; 3 Ib., 59; Elder v. Burns, 6 Hump. (Tenn.), 358. *Contra* in South Carolina, Witt v. Jefcoat, 10 Rich. Law, 388; Fagan v. Armisted., 11 Iredell, 433.

§ Ward v. Willis, 6 Jones, 183.

|| State v. Glenn, 7 Jones, 321; Cornelius v. Glenn, 7 Jones, 512; Smith v. Ingram, 7 Ire., 175. In accord, People v. Platt, 17 John. R. (N. Y.), 195; Hooker v. Cummings, 20 John., 90.

islature perhaps could not allow this so as to materially obstruct navigation.*

When a grant calls for a "corner on the bank of the river, then its meanders to another corner," etc., it is by implication of law that the grant extends to the middle of the stream, and this ownership is conferred for a certain purpose; at the same time certain rights by implication reside in the State. But if he has a grant for the bed of the stream he holds a higher position than that of riparian proprietor. This is the doctrine of the case of *State v. Glenn*, *supra*.

But a navigable stream in the technical sense, nor those large American rivers or sounds—fresh-water—which are in fact navigable, are not the subject of private entry and grant.† And no exclusive individual right to fish exists as to such streams.‡ On this question the High Court of Errors and Appeals of Mississippi has expressed this doctrine in a practical, reasonable way. They said "that the rights of the owners of the lands bounded by such streams are subordinate to the right and power of the State to use and appropriate them to the public good in promotion of navigation, and that such rivers, whether tide-waters or not, are, as to the jurisdiction and power of the State, to be considered as navigable rivers; . . . that whilst the right of property exists in the individual in relation to the streams of water exclusively his own, such as springs or small watercourses in the interior of his lands, and bounded by them on both sides, and while it may exist in reference to public rivers as against the interference of private individuals, it cannot be admitted to prevail as to public rivers against the paramount jurisdiction of the State."§

* *Davis v. Jenkins*, 5 Jones, 290.

See the able and exhaustive opinion of Judge Battle on this entire doctrine in the case of *State v. Glenn*, *supra*.

"Owners on navigable rivers have certain riparian rights whether they go to the middle of the stream or not. Among them are free access to the navigable part of the stream and the right to make a landing or pier for his own use or for the public, and this is property which cannot be taken except upon compensation." *Tate v. Milwaukee*, 10 Wall. U. S., 497.

† *Tatum v. Sawyer*, 2 Hawks, 266.

‡ *Fagan v. Armisted*, 11 Ire. N. C., 433, and authorities cited.

§ *Commissioners of Homochitto River v. Withers*, 29 Miss. R., 21. See the doctrine discussed by the courts of Iowa in *McMannus v. Carmichael*, 3 Clark, 1; *Haight v. Keokuk*, 4 Iowa, 199. See authorities collected by Tyler on Boundary, ch. 4.

As to Lakes and Ponds.—The doctrine of the English common law can have no reference to our large fresh-water lakes or inland seas. As to these there is neither flow of the tide nor thread of the stream. And as to these the law has assigned the shores down to low-water mark to the riparian owners, while the beds of the lakes and the islands therein belong to the public.*

The riparian owner on the great lakes, as well as on tide-water, has a right to build out such convenient wharves as do not obstruct the public right to navigation.†

It will not be forgotten that the law of boundary as applied to the sea and navigable streams below tide-water, is that *high-water mark* is the boundary, while lands bounded upon the great lakes (as held in some States as large navigable rivers) of our country extend to the *low-water mark*. This space between the high-water and low-water marks was considered the shore of the sea and belonged exclusively to the public.‡

In the boundary of the county of New York, which includes Manhattan and many other small islands, the beginning is on the — creek “at low-water mark,” “running along said creek at low-water mark,” etc. As to the various decisions of the State of New York in reference to the boundary of the city land under water, see Gerard on Water Rights, § etc.

The Law of Boundary in respect to Islands.—“According to the rule everywhere adopted in this country and in England, if an island arises in the sea it belongs to the sovereign or public, though by the civil law it belongs to the discoverer or first occupant. If an island be formed in a navigable stream, the same rule of the common law gives it to the public, while the civil law gives it to the owners of the land on each side. Should the island, however, arise in an unnavigable river, both the civil and common law agree in assigning it to the adjoining proprietors.”

In the case of *Watson v. Peters*, 26 Mich., Judge Cooley in

* *Canal Commissioners v. People*, 5 Wend. (N. Y.), 423, 447; *State v. Gilman-ton*, 9 N. H. R., 461; *Fletcher v. Phelps*, 28 Vt., 257; *Dillingham v. Smith*, 30 Me., 370; *Seaman v. Smith*, 24 Ill., 521.

† *Dutton v. Strong*, 1 Black's R., 23. See *Champlain & St. Lawrence R. R. Co. v. Valentine*, 19 Barb. (N. Y.), 484.

‡ Vattel's *Laws of Nations*, book i., ch. 22, § 275.

§ Those having occasion to do so may consult with profit the work of J. W. Gerard, Jr., on *City Water Rights, Streets, and Real Estate under Water*.

delivering the opinion said, as to whether, in the case of an island of a navigable stream, the riparian rights will extend beyond the centre of that portion of the stream between the island and the land conveyed, *quære?*

"If the *medium filum* of the stream bisects the island equally, each proprietor will take an equal share; but if unequally, then the larger share will belong to him to whose land it is nearest. But should the island arise, not in the middle but entirely on one side of the stream, then the whole of the island will belong to the owner of the land on that side."*

The Rights as to Alluvion.—"Alluvio is the natural increase of land by deposit on a river or sea shore."† "Lands formed by alluvion, that is, by gradual and imperceptible deposit on the shore of the sea, belong to the lord of the manor, and not to the king *jure coronæ*."‡

A man's land is said to be added to by alluvion where the accretion is made so gradually and imperceptibly, that no one can perceive the moment when the addition was made. The increase and deposit being *gradual* and *imperceptible*, the proprietor of the adjacent land is entitled to the increase and to the boundary thus enlarged.§

"By *alluvion*, as used in law, is meant such slow, gradual, and insensible accretion that it cannot be shown at what time it occurred." The common law and the civil are the same. Says the civil law: "That ground which a river has added to your estate by alluvion becomes your own by the law of nations; and that is said to be alluvion which is added so gradually that

* Tyler on Boundaries, ch. 6; see *Ingraham v. Wilkinson*, 4 Pick. (Mass.), 268; 17 Pick., 41; *Adams v. Reese*, 2 Conn., 481; *McCullough v. Wall*, 4 Rich. (S. C.), 68; *Crocker v. Bragg*, 10 Wend. (N. Y.), 260; *Handy's Lessee v. Anthony*, 5 Wheat. (U. S.), 374; *Howard v. Ingersoll*, 13 How. (U. S. R.), 381; *Jackson v. Halstead*, 5 Cow., 216.

† Stimson's Law Glossary, 19.

‡ Cole on Ejectment, 613.

§ *Halsey v. McCormick*, 18 N. Y. R., 147; *Patterson v. Gelston*, 23 Md., 432; *Morgan v. Scott*, 26 Penn., 51; *Krant v. Crawford*, 18 Iowa, 549; *Gerrish v. Clough*, 48 N. H., 9; *St. Louis Public Schools v. Risley*, 40 Mo., 356; *Barratt v. New Orleans*, 13 La. An., 105; *Jones v. Goulard*, 24 How. (U. S.), 41. As to the formation of alluvion generally, see *National Cyclopædia*, vol. i., tit. "Alluvium;" see *Sanset v. Shepherd*, 4 Wall. (U. S.), 502.

no one can judge how much is added in each moment of time.”* If the additional soil was made suddenly, and not by imperceptible degrees, it is not alluvion, and belongs to the owner of the bed of the stream, or the soil under the water where it originally flowed. See authorities, *supra*.

“If a private stream, which is the boundary between the lands of two proprietors, gradually and imperceptibly changes its course, the proprietor whose ground is encroached upon can claim nothing from his opposite neighbor, but the boundary line between them will shift with the gradual change of the river. If, however, the course of the river is diverted by some sudden catastrophe, no change of property will take place.” Authorities, *supra*.

Reliction.—“Reliction is the receding of the sea, whereby the land is left dry.”†

If the water in a navigable lake recede *gradually* and *insensibly*, the land gained belongs to the adjacent riparian owners. But if the *reliction* be sudden, the increase belongs to the State. This is the view taken by Judge Hall, at an early day, in the North Carolina case of *Murry v. Sermon*.‡

This doctrine of *alluvion* and *reliction* is stated in the most clear and impressive style in Blackstone’s Commentaries.§

The Phrase “Bank of a River,” or “Bank of a Stream.”—“A bank is the continuous margin where vegetation ceases.” So say some of the courts.||

Boundary on Roads and Streets—Walls, etc.—The authorities, both in England and America, uniformly agree to the legal proposition that “a person holding lands bounded upon the highway is held *prima facie* to own to the centre of the road.” This presumption is based on grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is supposed that when the road was originally formed the proprietors on either side contributed a portion of this land for the purpose.¶

* Ang., Watercourses, § 53.

† Stimson’s Law Glossary, p. 258.

‡ *Murry v. Sermon*, 1 Hawks., 56.

§ 2 Black. Com., 262; see Schultees on Aquatic Rights, 138.

|| *McCullough v. Wainwright*, 14 Penn. R., 171; Tyler on Boundaries, ch. 7.

¶ *Scoones v. Morrell*, 1 Beavan’s R., 251. As to American authority, consult Tyler on Boundaries, ch. 9; *People v. Law*, 34 Barb. (N. Y.), 494;

Of course, this ownership to the centre of the road, *usque ad medium filum viæ*, is a qualified right, and subject to the public use. Should the public abandon the same, then the rights of adjacent proprietors can be reasserted.

It was said, in some of the earlier New York cases, that a deed calling for a street in the city of New York, did not carry the ownership to the centre of the street, for the reason that the legal title to the soil was vested in the corporation.*

But subsequently it has been held, in that State that the doctrine applies to the streets in the city of New York as well as to the country villages.† This is the relative right of grantor and grantee.

This presumption in favor of adjacent proprietors is not a *presumptio juris et de jure* (that is, not an irrebuttable or conclusive presumption), but yields to evidence showing a different intent and different contract. Thus, in a case before the House of Lords, C. J. Coleridge said: "If lands granted were described as bounded by a house, no one would suppose the house was included in the grant; but if lands granted were described by a highway, it would be equally absurd to suppose the grantor had reserved to himself the right to the soil *ad medium filum*, in the greater majority of cases wholly unprofitable."‡

In Massachusetts, Gray, J., said: "In some opinions of this court it has, indeed, been implied or asserted that a boundary upon a road or street passed no title in the land under it. But in the more recent decisions the general rule has been repeatedly declared, and must now be regarded as the settled law of this commonwealth, overruling whatever is irreconcilable in the earlier cases, that a deed bounding land generally by a highway, with no restrictions or controlling words, conveys the grantor's

Sherman v. McKeon, 38 N. Y., 266; 23 N. Y., 61; Peck v. Smith, 1 Conn., 103; 18 Me., 76; 14 Mass. R., 149; 11 Gray (Mass.), 283 (note); Banks v. Ogden, 2 Wall. (U. S.), 57, 58; 3 Kent Com., 433.

* Dunham v. Williams, 37 N. Y., 251; Luce v. Carley, 24 Wend., 451.

† Bissell v. The New York Central Railroad Company, 23 N. Y., 61.

‡ Lord v. The Commissioners for the City of Sidney, 12 Moore's P. C., 473.

"Notwithstanding the general rule, if it appear that the soil of the road was not owned by the grantor, the terms of a deed bounding upon a highway are satisfied by a title extending only to the roadside." Dunham v. Williams, 37 N. Y., 251.

title in the land to the middle of the highway.”* These authorities hold that the same rules of law apply to a *private* way.†

“If one incloses his land up to a highway, so as to deprive the public of their right of travelling on the adjoining strips of waste land, where the road itself is not fit for use, neglects to keep the road in repair, passengers may make gaps in the hedges and trespass on his property, so long as they do not ride farther into it than is needful for avoiding a bad way.”‡ It has been held in New York that a person travelling on a highway which has become foundrous and impassable, has the right to remove enough of the fences in the adjoining close to enable him to pass around the obstructions, doing no unnecessary injury, but that he becomes a trespasser if he tears away other fences and tramples down the herbage in other parts of the close.§

Boundaries by Ditch or Wall.—Independent of statutory regulations, where two proprietors are separated by a ditch or a wall, and the owner of one side conveys his land bounding the grantee on the ditch or wall, the grant is presumed, until the contrary is shown, to extend to the centre of the ditch or wall, the same as in the case of land conveyed bounded on an unnavigable river or highway.|| If a wall be erected at the joint expense of adjacent landowners, insures the property of the land on which it stands where the quantity of land contributed by each party is known. There is in this case no transfer of property; the parties are severally owners of their respective lands as before. Each, for any injury to the portion of the wall standing on his own soil, has the ordinary remedy.¶

* *Newhall v. Ireson*, 8 Cush., 598; *Phillips v. Bowers*, 7 Gray, 24–26.

† *Fisher v. Smith*, 9 Gray (Mass.), 441; *Tyler on Boundaries and Fences*, 113.

‡ *Duncombe's Case*, 1 Rolle Abr., 390.

§ *Williams v. Safford*, 7 Barb., 309. As for the *reason* of this law, see what is said by Lord Chief Justice Abbot, as quoted by Mr. Tyler, in his work on *Boundaries*, p. 115.

|| *Tyler, Boundaries*, 117, citing *Warner v. Southworth*, 6 Conn., 471; 8 Barn. & Cress. R., 257.

¶ *Watts v. Hawkins*, 5 Taunton R., 20. See *City of Boston v. Richardson*, 13 Allen (Mass.), as to boundary walls.

CHAPTER IX.

STATUTE OF LIMITATIONS—LAPPAGE—COLOR OF TITLE.

IN ejectment the question of the possession of land constitutes an important feature. It is not confined to either plaintiff or defendant, but most usually the defence is made by the defendant, who has the right to defeat the plaintiff by showing title in himself or outstanding in another; and as the effect of the possession for the time limited is to give the possessor the *title*, this is itself sufficient to repel the plaintiff. Very often the *plaintiff* relies upon a title obtained by possession.

“By the term ‘limitation,’ as here used, is meant the *time* which is prescribed by the authority of law, during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment; or the time at the end of which no action at law, or suit in equity, can be maintained.”*

The term “prescription” has very much the same meaning as “limitation,” but in England the former applies more especially to incorporeal hereditaments, such as the rights of ways, water-courses, lights, etc. It is true that Blackstone seems to class corporeal hereditaments as being subject to the right by prescription, and as one of the methods of acquiring it; as, when a man can show no other title to the land he claims than that he, and those under whom he claims, have immemorially used to enjoy it.

It is not our purpose to discuss the reasons and propriety of limitations, except to say that *public policy* and private interest dictate that the dominion of things must not for a long time remain uncertain, so as to disturb the peace of society by giving rise to vexatious litigations; and that the indolent and dilatory man should be punished with the results of a failure to make claim of title in a reasonable time, which reasonable period has been fixed in the shape of legislative acts of limitation. And in regard to real property, the Supreme Court of the United States, in *Lewis v. Marshall*,† say: “Nothing so much retards the growth or

* Angell on Limitations, p. 1, notes 1, 2, 3.

† *Lewis v. Marshall*, 5 Peters, 570; *Hawkins v. Barney's Lessee*, Ib., 457. For a full and highly interesting discussion of the general doctrines of limita-

prosperity of a country as insecurity of titles to real estate; and labor is paralyzed when the enjoyment of its fruits is uncertain. The great public interest is, therefore, properly respected, and essentially protected by a strict observance of the long-established maxim, *vigilantibus non dormientibus inservit lex.*"

The most important acts of the English Parliament in reference to the limitations of actions was had in the year 1540, which was that of 32 Hen. VIII., ch. 2, and this was followed in 1623 by the more matured statute of 21 James I., ch. 16, entitled, "An Act for Limitations of Actions and for Avoiding of Suits at Law." And of this statute Mr. Angell says: "The last statute was generally adopted by the original American States when they were colonies, and, whenever it has been since superseded by other acts of limitation which do not essentially vary from it in respect to land, they are to be construed as that statute and all other acts of limitation founded on it have been construed."*

This same author further says: "But the period arrived when the statute of James, in so far as regards real property and the actions for the recovery of it, gave way to views of a more liberal and enlightened age. The well-known energetic and persevering efforts of Lord Brougham to reform the anomalies and abuses of the English law led to a commission, directed to five commissioners, in the year 1828, with instructions 'to make diligent and full inquiry into the law of England respecting real property and the various interests therein, and the methods and forms of alienating, conveying, and of assuring titles thereto, and whether any and what improvements could be made therein, and how the same might be carried out.'"

One of the results of this commission was the statute of limitations of 3 and 4 William IV., c. 27, in respect to the possession of land, actions for the recovery of it, etc.

Peculiarities of the English Acts of Limitations.—The English statute 21 James I. did not extinguish or bar the right, but

tions to actions, the practitioner is referred to Mr. Angell's work on Limitations of Actions. In the appendix of Mr. Angell's volume will be found the English statutes of 32 Henry VIII., ch. 2; 21 James I., chs. 16, 3, and 4; William IV., ch. 27; and that of each of the States of the Union on the limitation of actions.

* Angell, Limitation of Actions, 10.

merely the remedy.* And the act prior thereto was subject to the same construction. Under this holding if a party lost his remedy by *ejectment* he might afterwards have recourse to a remedy of a higher nature, as a *writ of right*.

So if under the statute of 32 Hen. VIII. he was barred of his real action by that statute, he might avail himself of a right of entry if brought within twenty years, as authorized by statute of James I.

At common law there was no time limited within which it was necessary to bring actions for the recovery of realty, but by 32 Hen. VIII., ch. 2, a *writ of right* was limited to sixty years next before the claim made. Some other *remedies* were limited to thirty years and fifty years. And the statute of 21 James provided that no person should make *an entry* into lands but within twenty years next after his title should *first descend* or accrue. Other writs by this statute were limited to twenty years. Under this statute the action of *ejectment* was not mentioned *eo nomine*, but it is provided that none shall make entry but within twenty years, and as the *ejectment* is founded on the right of entry of course it could not be maintained after the right of entry had gone.

But the statute of 3 and 4 Will. IV., ch. 27, provides by section 34 that "at the end of the time limited by that act *the right and title to the land, etc., shall be extinguished*." The result of which is that the possession being *adverse* for the period of twenty years gives the *fee* to the possessor, and of course *extinguishes* the title of the original owner. This is the effect of almost all the statutes in the United States, they having (in many of the States) provided in express terms that the party holding adversely for the time limited shall thereby acquire a title in fee to the land.†

* 1 Saund., 283, note; 1 Black. Rep., 678; Angell Lim., Appendix, 26.

† Tennessee, Georgia, South Carolina, California, Texas, Louisiana, Rhode Island, and perhaps one or two others, provide expressly that the holding possession for the time limited gives a *perfect title*.

Most of them provide for the kind of title or writing under which the party must hold, etc. Most of the other States follow the statute of 21 James I. as to the limitations, and bar the right to sue in any kind of action after twenty years. It is supposed that in almost all these statutes, the "*right of action*" being barred, the title is in effect *extinguished*, and the title vests in the possessor by

The statute of 3 and 4 Will. IV. was a most radical change in the English system of land laws. Says Mr. Warren,* in speaking of this statute: "It has swept away—shade of Fitzherbert!—indiscriminately between fifty and sixty species of actions, a most fertile source of difficulty and confusion to the reader of our ancient laws." This same English author has again said: "There is such a mass of intricate and obsolete law in all the old reporters, including even Plowden, Coke, and Sanders, as renders it eminently unadvisable for the student to attempt a continuous perusal of them. There is something proverbially repulsive in the form and structure of our early reports, which, to say nothing of their dreary black letter, Norman-French, dog-latin, are stuffed with all manner of obscure and ridiculous pedantries, scholastic as well as logical, involving the simplest points in endless circumlocutions and useless subtleties."

"And the time at length arrived when the astounding number of real actions, and actions pertaining to the realty, enrolled in the annals of English jurisprudence, with the exception of a petty remnant, was, at a single blow, annihilated."† This was done by the act of 3 and 4 William IV.

Under the statute of 21 James I. the possession of twenty years, which would bar the *entry*, was an *adverse* possession, but it seems that many questions arose in those times as to when the possession was *adverse*. And to obviate this source of controversy the act of 3 & 4 Will. IV., ch. 27, considers every possession *adverse* except: 1. *There be a payment of rent.* 2. *An acknowledgment in writing.*

It is said that the construction placed upon this statute has entirely got rid of the doctrine of non-adverse possession, as any possession for twenty years, where no rent has been paid, and no acknowledgment in writing, is a bar under the statute, provided the person claiming had a present right of entry.

We thus observe what an important change. Before this period, and while 21 James I. was in operation, the twenty years

* virtue of the *adverse* possession for the time limited. See all the State limitations, Angell, Lim., Appendix.

* Warren's Law Studies, 24; Angell, Lim., § 336.

† Angell, Lim., Actions, § 336.

did not prove a statute of *repose*, but it only had the effect to *bar one remedy while another might be employed*.*

But now, the twenty years' possession is presumed adverse, unless the fact of payment of rent is shown, or the title is acknowledged in writing; then, the twenty years gives the absolute title to the possessor; in other words, the possession during the period of limitation *perfects the title*. For further information, the student is referred to the appendix to Angell's *Limitation of Actions*, where the English adjudications are referred to. It will be well to mention that the ancient doctrine of *finis* was a sort of limitation on controversy.

Fines and recoveries were regulated by the statute of 4 Henry VII., and the effect of them was to put a *final end* to all controversies and suits after five years. But fines and recoveries have long since been abolished in England.

American Statutes of Limitations—Judicial and Legislative Struggles over the Same.—We have in this country some notable diversity of legal opinion in regard to the construction to be placed on certain statutes. The most conspicuous, perhaps, are those in North Carolina and Tennessee, especially in the latter State, growing out of the North Carolina acts of 1715 and 1797.† The statute of 1715 was passed, of course, while the "County of Albemarle," now North Carolina, was under the colonial government, and is, perhaps, in nearly the words of 21 James I. The construction placed upon this statute until about the year 1804 was to the effect that the *remedy* was simply barred, and that the possession under the same did not *create* a title in the party who had thus held the possession. This statute being adopted in Tennessee, controversy on a vast scale was the result.

* Notwithstanding the general doctrine that the statute of 21 James I. simply had the effect to bar the entry, some of the English cases held that twenty years' possession, under this statute, would entitle the party, it being purely a possessory action, to recover in ejectment. See Roscoe on Real Actions, 489, where it is shown that it was so ruled by Lord Holt, and recognized in Buller's *Nisi Prius*. This seems sufficient to satisfy the rule that the lessor of the plaintiff must recover on the strength of his own title. Roscoe, Real Actions, *Ibid*.

† For a complete history of these contests, and the change made by the Tennessee act of 1819, and the numerous decisions upon these points, attention is invited to the late Tennessee Digest, vol. iii., title "Land Law."

The meaning of "color of title" was open to a wide diversity of opinion.

This is strongly indicated by the expression of C. J. Catron (then on the Supreme Court bench of Tenn.) in the case of *Dyche v. Gass*.^{*} Referring to the argument in regard to "color of title," he said: "The naming of the term is calculated to alarm the courts and the country; that it (Act of 1715) produced more litigation than the statute was intended to cure!" The courts of North Carolina had been followed in their holdings on this statute by the Tennessee courts, as were many of their adjudications on boundary and other leading questions of land law, many of which are recognized as the highest authority at the present time. And, at a later date, the courts of North Carolina were controlling authority on land law controversy in Tennessee; thus, in the noted case of *Massengill v. Boyles*,[†] decided in 1843, the doctrine was held that *parol* evidence could not be used to vary the calls of the deed or grant, except on proof of *a different line being made and marked at the time of making the instrument*, and no other authority was cited than three or four North Carolina cases.

Finally, the legislature of Tennessee, in 1819, passed a new statute, with first and second sections carefully guarded, the preamble fully indicating the reasons for the statute:[‡]

"WHEREAS many disputes have arisen with regard to the proper construction of the statutes of limitation, and the time seems fast approaching when the titles to land will become so

^{*} *Dyche v. Gass*, 3 Yer., 397.

[†] *Massengill v. Boyles*, 4 Hump., 205.

The opinions of Henderson, Ruffin, Gaston, and Pearson, of North Carolina, are always authority on land law, especially, whether in law or equity. But it is believed that no State has more thoroughly "gone to the bottom" on real property law than the State of Tennessee. Having had a separate equity court, those questions which arise in that branch of the law are more thoroughly understood than in most of the States where the two systems have been blended. The opinions of Turley, Green, Catron, and McKinney are entitled to the highest respect. In later times, those of Nelson, Nicholson, and McFarland are of the highest order.

[‡] Thompson & Sterger (Code Tenn.), §§ 2763-4. These paragraphs of the Code correspond to sections 1, 2, of Act of 1819, which are here given in order to show the special character of this statute, and as illustrative of the general result of many other statutes. No doubt a well-defined statute of this kind in all the States would have prevented much doubt and consequent litigation.

perplexed that no man will know from whom to take or buy lands; for remedy whereof,

“SEC. 1. In all cases where any person or persons, their heirs or assigns, shall, at the passing of this act, or at any time after having had seven years’ possession of any lands, tenements, or hereditaments, which have been granted by this State, or the State of North Carolina, holding or claiming the same by virtue of a deed, or deeds of conveyance, devise, grant, or other assurance, purporting to convey an estate in fee-simple; and no claim by suit in law or equity, effectually prosecuted, shall have been set up or made to the said lands, tenements, and hereditaments within the aforesaid time, then and in that case the person or persons, their heirs or assigns, so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of land as shall be specified and described in his, her, or their deed of conveyance, devise, grant, or other assurance as aforesaid, in preference to and against all and all manner of person or persons whatsoever; and any person or persons, and their heirs, who shall neglect, or who shall have neglected for the said term of seven years, to avail themselves of the benefit of any title, legal or equitable, which he, she, or they may have to any lands, tenements, or hereditaments, within this State, by suit of law or equity, effectually prosecuted against the person or persons so as aforesaid in possession, shall be forever *barred*; and the person or persons, their heirs or assigns, so holding or keeping possession as aforesaid, for the term aforesaid, shall have a good and indefeasible title in *fee-simple* to such lands, tenements, or hereditaments.

“SEC. 2. No person or persons, or their heirs, shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments, but within seven years next after his, her, or their right to commence, have, or maintain such suit shall have come, fallen, or accrued; and that all suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments, shall be had and sued within seven years next after the title or cause of action, or suits accrued or fallen, and at no time after the said seven years shall have passed.”

The first section of this act specifically points out what is “color of title,” and, in terms, confers the “indefeasible title in fee-simple” on the party and privies holding such possession.

Most of the statutes of the States, say Messrs. Sedwick & Wait,* "are, in substance and effect, as follows: No person shall commence an action for the recovery of lands except within a certain number of years from the time when the right to bring such action accrued, or unless within the same number of years he, or one with whom he is in privity, has been in possession of the premises. As a rule, there are no provisions in the statutes of the different States providing in terms that adverse possession shall confer title upon the adverse possessor, nor any provisions as to what will constitute a disseisin of the true owner and an adverse possession in another, but questions of seisin and disseisin, entry and ouster, and as to what acts will establish an adverse possession by a stranger, and hence whether the statute can be pleaded as a bar to an action by the owner, are left to be determined by the courts in each case by the principles of the common law."

Some of these statutes, however, which really confer title in express terms, do not indicate *what* is "color of title," and this is left for the courts. Thus the Texas statute: "Any actual settler, who is a citizen of this republic, who may have and hold peaceable possession of any tract or parcel of land under 'color of title,' duly proven and recorded in the proper county," etc.† South Carolina, Georgia, and others describe in the statute the *particular instruments* under which the adverse holding must be had, which prevents much dispute, and tends to the accomplishment of what Tennessee did by the Act of 1819, to which reference has been made. But the second section of this Act of 1819 gave rise to considerable controversy in Tennessee. The first section having said that, holding seven years under "deed, conveyance, devise, grant, or other assurance, *purporting to convey an*

* Sedwick & Wait, Trial of Title to Land, § 725. The authors from whom the above is taken, while accurately expressing the phase of most of the State statutes, seem to have omitted to notice this Tennessee statute. South Carolina also gives the possessor title in fee. Likewise Georgia, Texas, Rhode Island, Louisiana, and perhaps California. The adverse possessor, by the express wording of the majority of the above-mentioned statutes, confers a fee-simple title. The Louisiana statute requires "*good faith*," and "*apparently good title*," in the possessor. It is called "prescription" in this State. The adverse possession, of course, must be under the kind of paper described in the statute.

† Act of Dec. 20, 1836, Hartley, Digest Laws of Texas.

estate in fee," and give fee-simple title, etc. The *second* section provided that "no person or persons, . . . etc., shall have, sue, or maintain any action or suit, either in law or equity, . . . etc., but within seven years."

So it is held in that State, after many elaborate arguments and thorough search by the courts for reason and analogy, that the party holding under the first section took the fee-simple title, while the second section barred the possessory action of ejectment, repelled the true owner, but that the possessor only had a mere *protected possession*, which was *lost* as soon as vacated; that it was not vendible, transmissible, nor subject to execution; that the title *remained* in the true owner. In other words, if the party held under a paper title not recognized in the first section, or was in possession without any writings whatever for the seven years, it was only a *possession protected* while the party *occupied*, and that, too, as against the true owner. Some of the numerous cases on this point appear in note.* The right of the true owner was not extinguished, though his entry was barred. The case of *Rutherford v. Franklin*, *supra*, illustrates the workings of this statute as held by the court. The defendant offered a "paper writing," with most of the formalities of a deed, but, having no seal, was *not* a deed, and it was held that the holding under *this* paper was not sufficient to *confer title* under the *first* section, but that under the *second* section it extended the possessory right to the limits of the paper, and no further effect. The possession of a naked trespasser for seven years was protected in the possession as though held under an informal or void title, except the informal and void title was allowed the effect to extend the possession to the metes and bounds of the void paper title.

When a naked trespasser claimed under the second section the trespasser must show "a substantial inclosure and actual occupancy to the whole extent of that inclosure, definite, positive,

* *Wallace v. Hannum*, 1 Hump., 448; *Dyche v. Gass*, 3 Yerg., 397; *Campbell v. Crockett*, 8 Yer., 225; *Lea v. Netherton*, 9 Yerg., 315; *Critzlinger v. Catron*, 10 Hump., 24; *Rutherford v. Franklin*, 1 Swan., 321.

In the case of *Critzlinger v. Catron* the court say the possession under the second section was sufficient to repel the possessory action of ejectment, but was lost the moment it was abandoned, that the same was not vendible, discernible, nor liable to execution.

and notorious for the whole term of seven years.”* This construction of the second section is like that placed on 21 James I. But at that time in England the owner had his resort to a writ of right, which has no existence in Tennessee.† We then have in that State this result: the *real* owner fails to sue a trespasser for seven years, his only remedy is ejectment, and, being in that State purely a *possessory* action, he is barred. The trespasser repels the suit of the true owner of the fee, but has no title which he can transmit, nothing which a creditor can take, *nothing* but the bare *right* to stay on the premises as strictly defined, but which right ceases the moment of abandonment or death. Meanwhile the true owner has no writ of right as existed under the English law formerly for his negligence to bring suit and have it “effectually prosecuted,” his rights to the land held by the trespasser are suspended to await the *vacating* or *death* of the seven-year trespasser. This, said Judge Catron, was sustained in view of the policy to protect and encourage agriculture‡ and the tillage of the soil as well as a “statute of repose.”

It would seem that the general language of several of the statutes of the States would lead to the same results as that of the second section of the Tennessee act of 1819, as herein described. That is to say, simply to bar the remedy. But I suppose where the possessor claims strictly under “color of title,” the courts are disposed to construe the statute so as to pass the title to the possessor. About this more will appear hereafter.

Under the Tennessee statute it is held that by the first section of this act the possession under a fraudulent or forged deed protected the possessor if held adversely for the seven years, and that the possession of two or more holding under the same fraudulent or forged deed could connect their possessions.§ This same doctrine is held in New York,|| where it is said “neither fraud

* *Dyche v. Gass*, 3 Yerg., 397, citing 2 Johns. R., 239; 4 Johns. R., 390; 10 Johns. R., 447.

† *Norvell v. Gray's Lessee*, 1 Swan., 96. In Texas also, where the period is given to a naked trespasser, “actual occupancy” is required. *Sloan v. Martin*, 33 Texas, 418.

‡ Same policy announced by the Texas courts. *Kinney v. Vinson*, 32 Tex., 128.

§ *Clark v. Chase*, 5 Sneed, 636; *Love v. Shields*, 3 Yerg., 405.

|| *Humbert v. Trinity Church*, 24 Wend., 587; see *Sanders v. Hughes*, 53 N. Y., 296.

in obtaining or continuing the possession, or knowledge on the part of the tenant that his claim is unfounded, wrongful and fraudulent, will excuse the negligence of the owner in not bringing his action within the prescribed period." But in their very recent treatise on the *Trial of Title to Land*, Sedwick & Wait say that the earlier cases in the State of New York were to the contrary of that announced in *Humbert v. Trinity Church*, but seem to think the latter case is now the prevailing doctrine in that State.*

They show, however, in Missouri, Massachusetts, Vermont, Mississippi, California, New Jersey, Pennsylvania, and other States, it is held that the holding under "color of title" and claiming the benefit of the constructive possession must be *bona fide* and without fraud.† Georgia, Louisiana, and Illinois require by statute "good faith." See those statutes.

The reason for the great confusion, as may modestly be suggested, originates from the "wording" and "verbiage" of the American statutes of limitation in regard to land.

Now the construction placed on the statute of 21 James I. being simply to "bar the entry," leaving the title unaffected, must have been known to our legislators and lawyers. The 34th section of 3 and 4 William IV., ch. 27, was known to differ from 21 James I. in this, "at the end of the time limited by that act, the *right and title to the land, etc., shall be extinguished.*"‡ The American idea seemed to be that limitations in the manner described should *work out title*; or rather that "*possession*" as described by statute should give the *absolute title*. This was the surest means of effecting "repose" and "quieting titles," but, strange to say, but few of the statutes have said, in unequivocal terms, what they meant. Perhaps the statutes of South Carolina and Georgia contain the clearest expression of the American idea.§ They say "*all possessions*" of or titles to land, and being

* Sedw. & Wait, *Title to Land*, §§ 775-777.

† As to this position, among others, they cite *Welborn v. Anderson*, 37 Miss., 163; *Smith v. Roberts*, 62 Ala., 86; *Gregg v. Sayre*, 8 Peters, 253; *Edge v. Medler*, 82 Penn. St., 98; *Atwood v. Fricott*, 17 Cal., 43; 62 Ind., 238; *Bradley v. West*, 60 Mo., 41; 53 Mo., 465; 68 Mo., 371; 27 Iowa, 510; 51 Texas; 32 Texas; *Den v. Hunt* (Spencer, N. J.), 493; 32 Md., 355.

‡ Angell, *Limitations*, App., for the English Acts of 21 James I., and 3 & 4 William IV. See App., page 26, for construction of these acts, notes 5 and 6.

§ See statutes of those States.

held in such a *way* and for such a time shall confer *title*; while the statute of Alabama simply provides that "no person shall make entry therein," except within twenty years, etc. The statute is perfectly silent as to the *effect* of the *possession* on the *title* to the property. The "entry" is barred, but who has the title? While Missouri, Arkansas, and perhaps others, say "no action" "shall be brought," in the North Carolina statute it is provided that on failure to "enter or make claim" within the time, etc., "shall be utterly excluded from an entry or claim thereafter to the same." But it seems that the great point to be accomplished by the statute of New York was to define "adverse possession."

What is *adverse possession*, and what the *legal effect* of adverse possession, are different questions. Thus *adverse possession*, in the first section of the Tennessee Act of 1819 *creates a title*, while *adverse possession* under the second section of the same act only gives a *defensive possessory right*, but not a transmissible *title*.

The New York statute prescribes what kind of possession is *adverse*, when held under "some written instrument," and what shall constitute *adverse possession* in those "claiming title not founded upon some written instrument." This is well, although, perhaps, declaratory of the common law, but are the *effects* of holding under a "written instrument" the same in *law* as holding *without* a written instrument? Shall the "claimant," though a pure trespasser in the beginning, be equally favored with the holder of a "writing" or "color of title?"

These questions were left to the courts, and as to how they decided will appear in this chapter. It is true that section 5 says, "no action" for the recovery of any lands, etc. This, it would seem, not only bars the "right of entry," but *all actions*. The effect of which must be to *create title* in the possessor holding in the manner prescribed. The only remark, perhaps, allowable by way of criticism is, that it would have been more *satisfactory*, in view of the peculiar *constructions* placed upon the English and some American statutes (the North Carolina Act of 1715, for instance) to have said *who has* and *where* is the *legal title* at the end of this *adverse possession*. This the English statute of 3 and 4 William IV., ch. 27, has done. The statute of possession of the Island of Jamaica converts the possession of seven years into

an absolute title, and so do several of the States already mentioned.*

Title by Limitation Acts, and the Character and Ingredients of the Possession which will Mature Title.—The plan followed by most of the writers is, to treat of "*adverse possession*" without a special attempt to show the *direct legal effect* of such possession; thus leaving the matter where some of the States' statutes leave the question in doubt. It does not seem very difficult to define an *adverse possession*. But supposing the possession *adverse*, the question is, what are the *legal results* as to the *title* of the particular land? Therefore, it seems to the writer, that "*title by possession*," or "*title by limitation*" acts is more appropriate, because *adverse possession*, alone, is but one ingredient of the title; this possession must be "*defined*" and "*ascertained*," and it must be held either under a "*writing*," "*color of title*," or not, and the question of "*good faith*" in many of the States becomes a question.

As this possession is a mode of *obtaining title*, the *terms* of the statute must be complied with, and the possession must come up to the requirements of the law; otherwise the title to lands would become too precarious. It will appear, however, that different tribunals have come to different conclusions upon this subject, as regards the *constructive possession*. Thus, it is held in New York that the doctrine of *constructive possession* does not apply to *large tracts of land* not managed according to the custom and business of the country;† while in North Carolina‡ it is held that actual possession under color of title for seven years, though a very small portion, and that in the midst of the woods, will confer title to the entire tract, there being no actual possession by any other person.

The Possession must be Adverse.—This is an essential ingredient of the *possession* required under the limitation acts. For, if the possession is what is called a *permissive possession*, it will never ripen into a title against the true owner. If the possession is taken in the first instance in subordination to the true title,

* Angell, Limitations, ch. i., § 5; ch. 31, §§ 380 and 381 (notes).

† Thompson v. Burhans, 79 N. Y., 100; 61 Barb., 260. See Abbott on Trial, Evidence, 693.

‡ Lenoir v. South, 10 Ire., 237; Carson v. Burnett, 1 Dev. & Bat., 546.

with no *intention* of claiming in hostility to the right owner, the requirements of the statute cannot be met, no matter how long the possession may have been.

Says Ch. J. Marshall, in *Kirk v. Smith*:* “It has not only been recognized in the courts of England, but in all others where the rules established in those courts have been adopted, that a possession which was *permissive*, and entirely consistent with the title of another, should not bar that title, and that it would shock the sense of right, which must be felt by all legislators and judges were it otherwise.” To constitute this possession *adverse*, it may be said, generally, that two things must concur:

1. *Actual possession* by the adverse claimant, and

2. An intention to oust the true owner and possess for himself.†

And, of course, a *continuation* of the possession during the time fixed.

Says Mr. Angell: “The fact of possession *per se* is only an introductory fact to a link in the chain of title by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seised, and, of course, creates no positive title in any case.” “The reason is, that it may not have been originally taken or subsequently held, with an *intention* to claim the premises as owner, and may have been with a perfect understanding between the possessor and the proprietor.”‡

Says a case in South Carolina:§ “Where a party claims by the statute, he is required to show at what time he took possession of the land, and how long he has held it; and when a tenant claims to hold adversely, he must show when that intention was made known to the landlord.” So the *bare possession* of land is evidence of no more than the fact of present occupation by

* *Kirk v. Smith*, 9 Wheat. U. S. R., 241.

† Sedw. & Wait, “Title to Land,” § 729; *Bradstreet v. Huntington*, 5 Peters, 439; *Davis v. Bowmar*, 55 Miss., 765. Possession, to be effectual, either to prevent a recovery or vest a right under the statute of limitations, must be actual possession, attended with manifest intention to hold and continue it. It must be, in the language of the authorities, an actual, continued, adverse, and exclusive possession for the space of time required by the statute. It need not be continued by the same person, but, when held by different persons, it must be shown that a privity existed between them. *Doswell v. De La Lanza*, 20 How., U. S., 32; *Wheeler v. Moody*, 11 Texas, 372.

‡ Angell, Limitations, § 384. § *Whaley v. Whaley*, 1 Spears (S. C.), 225.

right; for the law never presumes a wrong.* But the possession must be so open and exclusive as to amount to a disseisin.† And when the disseisin or *ouster* takes place, the statute begins to run.

Says a late writer: "Bearing in mind, at the outset, that the object of the statute is to cut off and defeat the claim or rights of the true owner, we arrive at the general principle, that the criterion of the time when the statute begins to run is the *ouster of the true owner*, and . . . that it is not in theory the *entry* of the adverse claimants.‡

So it was held, in *Green v. Harmon*,§ that if a defendant run his fence so near the line between him and the lessor of the plaintiff as to induce the jury to believe that it was a *mistake* merely, or that the lessor of the plaintiff, though reasonably diligent, might so have thought it, and have mistaken the character of the possession, although on the land of the lessor, it might be considered *permissive*, and not adverse. There are quite a number of cases|| in the reports showing that a holding by mistake or without the *intention* to hold adversely, has no effect under the statute. The student can readily suggest the numerous relations in which the possession is not *adverse*, especially in the *beginning*; such as the relation of co-tenants, landlord and tenant, mortgagor and mortgagee, and trustee and *cestui que trust*, and the cases under the doctrine of *primogeniture*, the entry and possession of the younger brother is the possession of the heir or elder brother, and not adverse.¶

A mere claim of title, unaccompanied with *adverse* possession,

* Justice Story, in *Ricord v. Williams*, 7 Wheat. (U. S.), 59. In accord, *Smith v. Lorillard*, 10 Johns., 355; *Codman v. Winslow*, 10 Mass., 146; 29 Conn., 391; 12 Iowa, 107; *Harvey v. Tyler*, 2 Wall. (U. S.), 328; *Jackson v. Thomas*, 16 Johns., 293.

† *Sparhawk v. Bullard*, 1 Met. Mass. R., 95; *Bradley v. West*, 60 Mo., 41; *Thomas v. Marshfield*, 13 Pick. (Mass.), 250; *Robinson v. Lake*, 14 Iowa, 421.

‡ Sedw. & Wait, § 729.

§ *Green v. Harmon*, 4 Dev. (N. C.) 158.

|| See the cases on this point, 3 Watts (Penn.), 280; 1 B. Mon. (Ky.), 364; 11 Mass., 296; 33 Alab., 38; *Phelps v. Henry*, 15 Ark.; *Howard v. Reedy*, 29 Geo., 152; 36 Vermont, 273; *Gilchrist v. McLaughlin*, 7 Ire., 310.

¶ *Dowdall v. Byrne*, Batt. (Irish) R., 373; *Gilbert on Tenures*, 28; Bull. N. P., 102. On the doctrine of adverse possession, disseisin, etc., see Mr. Smith's note to Taylor, dem. *Atkins v. Horde*, 1 Burr. R., 60; Smith's Leading Cases; Angell on Limitations, ch. 31, § 390; Sedw. & Wait, Trial of Title to Land, chs. 28, 29, 30 (the latter chapter on "Color of Title").

gives the owner no *cause of action*, consequently his rights cannot be affected. For there must be such an *invasion* of the rights of the owner as gives him a cause of action, which he having failed to prosecute within the period fixed by the statute, he is presumed to have extinguished or surrendered.* “The clearest and most comprehensive definition of disseisin and adverse holding, perhaps, is an *actual, visible, and exclusive* appropriation of land, *commenced and continued* under a claim of right, either under an openly avowed claim or under a constructive claim, arising from the acts and circumstances attending the appropriation, to hold the land against him who was seised.”† A claim made to land under color of title is an ouster; otherwise, it is a mere trespass.‡

The leading idea is, there must be notice to the world; and it was held in North Carolina that “building a shed, quarrying rock, erecting a limekiln, cutting wood,” etc., were sufficient acts of ownership, because they were “of a nature calculated to attract more than ordinary notice.”§ While in New York, the claimants under a tax deed caused some surveying to be done on the land, and paid some taxes thereon, it was held that “such acts have never been held to show a possession for any purpose.”||

The terms disseisin, ouster, and *adverse possession* are used in the authorities. But it seems that “disseisin” or “ouster” is the *result* of the first entry of the adverse claimant.

The term “disseisin,” Lord Mansfield thought, signified at common law some mode or other of turning the tenant out of his tenure and *usurping* his place and feudal relation.

The consequence of “disseisin” was, that if the tenant who was disseised allowed the disseisor to remain in possession and perform the feudal service for a year, and then the disseisor died seised, the entry of the tenant was taken away, on the principle that

* *Abell v. Harris*, 11 Gill. & J. (Md.), 371; *Cooper v. Smith*, 9 Serg. & Rawle Penn. R., 26.

† Angell, *Limitations*, § 390, and authorities cited in ch. 31; *Smith's Leading Cases*, vol. ii., p. 396.

‡ *Ewing v. Burnett*, 11 Peters (U. S.), 41.

§ *Moore v. Thompson*, 69 N. C., 120.

|| *Thompson v. Burhans*, 79 N. Y., 100. For the discussion of the principles of adverse possession consult *Davis v. Bowmar*, 55 Miss., 671.

he was to lose the feud unless he performed services to the lord annually. The effect of disseisin was to reduce the claim of the true owner to a mere right of entry, which he could not assign, but was put to his real action in order to reinstate himself. Then the statute 21 James I., ch. 16, limited the time to twenty years in which the real action could be brought. But there is this difference between the *feudal* disseisin and the disseisin which is the result of *adverse* possession under a statute, namely, the disseisee did not obtain *absolute title*, but was subject to one or more actions; the descent cast, and the period of limitation only being a bar to certain *remedies*. But treating the *wrongful* possessor under our statutes as the disseisor he not only *bars* the *remedy*, but obtains the *absolute title*. Such is the effect of the statute of 3 & 4 Will. IV., c. 27, and of the American statutes of limitation, especially in those cases where the *wrongful* possessor *enters* and holds in the manner recognized by law, under a color of title fixing metes and bounds, the *entry* being hostile. Under the original idea of "disseisin" it was always accompanied by force, or a wrongful entry, and then holding by force, but now ouster and disseisin are identified with adverse possession. As said in *Clapp v. Bromagham*, 9 Cow. (N. Y.), 55, disseisin means this: "The owner is divested against his will of his seisin and possession, and that seisin is usurped by another, who wrongfully holds it as his own."

So it would seem that much of this intricate and curious learning growing out of the feudal policy is now only important in comparing the *past* with the *present*, and thereby showing the changes of rules of property, and the adaptation of legal science to all the varying conditions of human progress.

Whether called "disseisin," "ouster," or simply *hostile possession*, it matters not, provided we can ascertain with reasonable certainty a state of *facts* and *circumstances* which work the *loss* of title to one and the *gain* of title in another; we have in this the whole doctrine of *adverse possession* under our statutes. These facts are made up from what indicates the *quo animo* of the possessor,—the *declarations* and *acts* of the party having a controlling influence. These questions of fact must be determined by the jury, and the principal difficulty consists in arranging the facts so as to enable the court to tell the jury *when* the presumption of

law attaches as fixed by the statutes.* In arriving at these results both natural and artificial presumptions are relied on by the court and jury.†

It is held by Spencer, J., in *Smith v. Burtis*,‡ when adverse possession is relied on it is not necessary that the title under which the party entered should be a "*rightful title*." "The fact of the possession and the *quo animo* it commenced and continued are the only tests."

In Maryland, and perhaps other of the States, the statute of 21 James I., ch. 16, with its savings, is still in force, but this does not vary the ingredients which constitute adverse possession.§

What is a Complete Possession in Contemplation of Law?—It requires a corporeal occupation, and that attended with the will of the mind—the *possessio pedis*, with the manifest purpose to hold and continue it against the claims of all others, to make the possession adverse to the true owner. Among the acts indicative of this *intent* may be mentioned the digging of stones or turfs, as in England, with the occasional cutting of timber, and almost everywhere in actual improvement and cultivation of the soil, and the like.||

* *Bradstreet v. Huntingdon*, 5 Peters U. S. R., 402; 8 Cowen (N. Y.), 589.

† *Gulick v. Loden*, 1 Green (N. J.) R., 68.

‡ *Smith v. Burtis*, 9 Johns. R., 180. Lord Mansfield says "disseisin is a fact to be found by the jury." That the question of adverse possession is one of *intention*, to be left to the jury, see the full reference to the American authorities cited (in note 2) at page 338 of Angell on Limitations. Sedw. & Wait, ch. 29.

§ 4 Griffith's Annual Law Reg., 930.

|| *Stanly v. White*, 14 East. R., 332. As to what constitutes possession in contemplation of law under limitation acts, see *Jackson v. Halstead*, 5 Cow. (N. Y.), 219; opinion of Kent, 2 Johns., 230; *King v. Smith*, 1 Rice (S. C.), 10; 4 Mass., 416; 6 Serg. & Rawle, 21; 6 Mass., 229; 7 Wend. (N. Y.), 62; 6 Pick. (Mass.), 172; 1 Shep. (Me.), 178; *Webbs v. Hynes*, 9 B. Mon., 388; *Tredwell v. Reddick*, 1 Ire. (N. C.), 56; *Ib.*, 535; *Drake v. Curtis*, 1 Cush. (Mass.), 395; *Woods v. Banks*, 14 N. H., 101.

In North Carolina cutting timber and getting rails yearly, but a few weeks at a time, though only valuable for timber, does not constitute an adverse possession. *Bartlett v. Simmons*, 4 Jones's Law, 295. And to the same effect in Georgia, *Watts v. Griswold*, 20 Ga., 732; see also 36 Penn. St., 513; also *Miller v. Platt*, 5 Duer (N. Y.), 272; Angell, *Lim.*, ch. 31, and cases cited.

There is a plain difference between the possession which will bar the true owner of the title, called adverse possession, and the possession which is sufficient to support a title against an intruder in action of ejectment. *Hunter v.*

A continued residence on the land is not necessary, if the same be inclosed and used in such manner as to give publicity to the possessor. So the making of improvements, or the receiving the rents for a considerable length of time without residence.* In North Carolina† the following charge to the jury was sustained by the Supreme Court: "That such possession must be by actual occupation and continuous, and accompanied by the exercise of all such acts of ownership over the same as persons usually exercise on their own lands; that, among these acts of ownership, were the clearing and cultivating of new fields and turning out old ones when worn out, and cutting timber promiscuously."

In the case of *Lenoir v. South*,‡ in the same State, the following facts were held sufficient to give the defendant title to the metes and bounds of the paper-title under which he claimed: In the spring of 1840 the defendant cleared a small piece of land, about *three rods square*, and inclosed it by felling four trees around it, and throwing branches and brushwood on them; that he planted potatoes therein, cultivated and gathered them in 1841; that, in 1842, he enlarged the clearing to three acres; that the same was planted in potatoes in 1841, but pigs got in and rooted them nearly all up, so there were but few vines to be seen, and a few stalks of corn seem to have been worked; that this inclosure was surrounded by woods, and was three-quarters of a mile from the defendant's dwelling, which was nearer than any other; that the land was situate in a mountainous region, where there were but few inhabitants.

C. J. Ruffin, in the opinion, says: "It may seem, at first view, a hardship on the owner of wild lands, situate as this is, and perhaps at a distance from him, to lose his title by reason of a possession of which he probably would not, and here certainly had not, early knowledge. But the law cannot suppose that an owner will not look to the condition of his property, at least so far as to

Starin, 26 Hun. (N. Y.), 529; *Wheeler v. Spinola*, 54 N. Y., 377; *Sedw. & Wait*, § 723.

* *Jackson v. Howe*, 14 John. (N. Y.), 405; *Brown v. Porter*, 10 Mass. R., 93; *Hawke v. Senseman*, 6 Serg. & Rawle (Penna.), 21; *Miller v. Shaw*, Ib., 129; *Doe v. Thompson*, 5 Cowen (N. Y.), 371; 10 Mass., 464; 8 Pick. (Mass.), 272; *Mackentile v. Savoy*, 17 Serg. & Rawle (Penna.), 104; 11 Mass., 296.

† *Wallace v. Maxwell*, 10 Iredell, 110.

‡ *Lenoir v. South*, 10 Ire., 237.

discover an intruder within the period of seven years, and take the necessary steps to assert his own right; and therefore an omission to do so must amount to the *laches* for which the law deprives him of his entry and vests the title in the possessor.”*

This doctrine, as to what acts constituted a possession, had been discussed by the same learned judge (Ruffin) sixteen years before the case of *Lenoir v. South*. This was in the case of *Green v. Harmon*.† In this case it was held that overflowing land by stopping a stream below it, is not a possession which will perfect a title under the statute; neither is cutting timber alone sufficient. The Chief Justice said: “The overflowing of land by an act not done on it, but by stopping a watercourse below on one’s own land, is not an ouster of the owner from the land overflowed. The remedy for the injury is not trespass, but an action on the case for the consequential damages.

“Hence, however long it may continue, it affords of itself only a presumption of a grant of the easement, and not of the conveyance of the land. The other question is not so entirely clear of difficulty. The case does not state the extent to which the timber was cut. There is much land in the State of which nearly the whole value consists in the timber, its fertility not being sufficient to induce a prudent proprietor to erect habitations, or clear a plantation on it. In such instances the timber is frequently all taken off, and it would not seem easy to give more positive evidence of asserted ownership and enjoyment. On the other hand, any rule that could be laid down would be so wanting in precision as to the extent to which the trespasses should be carried to constitute an ouster, as to leave the whole subject in uncertainty. It is safest to require an actual occupation, such as residence or cultivation; something to make it emphatically the party’s close, which is in conformity to the ancient rule of the common

* The following is the statute upon which the decision above is based: “When the person in possession of any real property, or those under whom he claims, have been possessed of the same, under known and visible lines and boundaries, and under colorable title, for seven years, no entry shall be made or action sustained against such possessor by any person having any right or title to the same, except during the seven years next after his right or title shall have descended or accrued. . . . Such possession shall be a perpetual bar,” etc. *Battle’s Revisal*, ch. 17, sec. 20.

† *Green v. Harmon*, 4 Dev. Law, 158 (decided in 1833).

law, and also to the application of it to our situation, as early made in the State."

The court refers to the case of *Simpson v. Blount*,* in which the land was a *swamp*, of which no other use could be made in its natural state but by taking the timber off, which was likened to cutting rushes annually in a marsh. He says this is an exception founded on necessity. The court said another exception might be the making of turpentine,† as practiced in the lower part of the State, which is an operation partaking of the nature of cultivation, it being the use, too, for which the particular land is adapted.‡

In New York and New Hampshire it has been held, in the former that a "possession fence," as it is called (being an inclosure by lapping of fallen trees), and in the latter a *brush-fence*, are not of the character of possession to protect a wrong-doer.§

The "payment of taxes," in connection with certain other facts and circumstances which are notorious and are strongly indicative of ownership, may be looked to by the jury. Thus, if the *owner* acknowledge himself to be out of possession of the uninclosed and unimproved lands and suffer the claimant to pay taxes upon it, or the like.||

In reviewing all the authorities, Mr. Angell says: "The doctrine of the Supreme Court of the United States is, that to constitute an adverse possession, there *need* not be a fence, building, or other improvement made; and that it suffices for the purpose

* *Simpson v. Blount*, 3 Dev. Law, 34.

† See page 161 of the Opinion in *Green v. Harmon*.

‡ As to possession according to the custom of the country, and the use for which the land is adapted, and paying taxes, etc., see *Criswell v. Artemus*, 7 Watts (Penna. R.), 580. Subsequently it was held, in North Carolina, the occupation of pine land, by annually making turpentine on it, is such an actual possession as will oust the constructive possession of one claiming merely under a superior title: *Bynum v. Carter*, 4 Ire., 310. As to *mixed* possessions, see *Stewart v. Harris*, 9 Hump. (Tenn.), 714.

§ *Jackson v. Schoonmaker*, 2 Johns. (N. Y.), 230; *Hale v. Gliddon*, 10 N. H., 397. In accord, *Colburn v. Hollis*, 3 Met. (Mass.), 125; *Armstrong v. Risteau*, 5 Md., 256; *Bennett v. Crocker*, 8 Greenl. (Me.), 239. Occasional acts of ownership by broken and unconnected acts of dominion, not sufficient. *Ewing v. Alcorn*, 40 Penn. St., 492; *Smith v. Mitchell*, 1 Marsh. (Ky.), 207; *McCarty v. Fourcher*, 12 Mart. (La.) R., 11; *Watts v. Griswold*, 20 Ga., 732; *Andrews v. Mulford*, 1 Haywood (N. C.) Rep., 311.

|| *Royer v. Benlow*, 10 Serg. & R. (Penn.), 303. In accord, *Heiser v. Richel*, 7 Watts (Penn.), 35.

that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute. That much depends upon the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it. That it is difficult to lay down any precise rule in all cases; but that it may with safety be said, that where acts of ownership have been done upon land, which from their nature indicate a notorious claim of property in it, and are continued sufficiently long, with the knowledge of an adverse claimant, without interruption or an entry by him, such acts are evidence of an ouster of a former owner, and an actual adverse possession against him; provided, the jury shall think that the property was not susceptible of a more strict or definite possession. That neither actual occupation, cultivation, nor residence is necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement, and the continual claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim."* But these acts of ownership apply to cases where the party enters under color of title. As it is suggested these rules would not be satisfactory in the case of a pure wrong-doer.† In the case of a naked trespasser the *possession* should be better defined by actual occupancy or inclosure.

The possession of a wrong-doer must be strictly *possessio pedis*.

"Actual, visible, and substantial *inclosure*‡ is decisive proof of disseisin, and also of the *limits* of it."§

* For the above general and comprehensive statement the following authorities are cited: *Ewing v. Burnett*, 11 Peters, 53; *Elliott v. Pearl*, 10 Peters, 442; *Barclay v. Howell's Lessee*, 6 Peters, 513; 4 Iowa, 18; 21 Ark. B., 9.

† See Angell, Limitations, § 400 (note).

‡ Inclosure or residence not necessary, but such a use and occupation of it as from its nature is susceptible, under a claim of ownership. 9 Hump., 762; 5 Sneed, 631; 2 Cold., 28, 64; 3 Head., 301. But if the land be susceptible of cultivation or residence it is so well understood and easy of application it is best not to depart from it. It results in uncertainty. Exceptions will not be extended further. They extend to banks, sand-banks, fish-traps, stone-quarries, coal-mines, and the like. 1 Lee (Tenn.), 741; 1 Swan., 385; 3 Head., 301. As to what is *adverse possession*, see 7 Yerg., 231; 8 Yerg., 381; Meigs, 427; 6 Hump., 75; 10 Hump., 345; 3 Head., 698.

§ Angell, Limitations, § 395; *Jackson v. Howe*, 14 Johns. (N. Y.), 405; *Johnson v. Irwin*, 3 Serg. & Rawle (Penn.), 291; *Miller v. Shaw*, 7 Serg. & Rawle,

The Rule as to Wild Lands Granted.—When the question is, what amounts to a possession sufficient to bar the right of entry or to confer title, the rule is more strict where the country is old and densely inhabited, than where lands are wild and in a state of nature, like much of the lands in the United States. When these lands are patented or granted, the patentee or grantee has a *constructive* possession of the entire tract, although in the actual possession of no part thereof. If these large uncultivated bounds be entered by a party without title, the disseisin is limited to the *actual* occupancy.* Says C. J. Parsons, of the Supreme Court of Massachusetts: “A disseisin of the owner of uncultivated land by entry, and the occupation of the land by a party not claiming title, the occupation must be of that nature and notoriety that the owner may be presumed to know that *there is a possession of the land*; otherwise, a man may be disseised without his knowledge, and the statute of limitations run against him, while he has no ground to believe that his seisin has been interrupted.”†

The wrong-doer, having no claim of title, must therefore be limited as a general rule to the *actual occupancy* or a *possessio pedis*, and it may be that the “existence of visible and definite boundary marks” may be competent to *enlarge* the possession beyond the actual occupancy.‡ It was said in another case,§ “Where one

129; Davidson's Lessee v. Baker, 3 H. McHen. (Md.) R., 621; Smith v. Hosmer, 7 N. Hamp., 436; Wartrous v. Southworth, 5 Conn., 305; Armstrong v. Risteau, 5 Md., 256; Hull v. Gittings, 2 H. & Johns. (Md.) R., 391; Goewey v. Wrig, 8 Ill., 238; Hindsman v. Worthen, 22 Ga., 47; Putnam v. Bowker, 11 Cush. (Mass.), 542.

In New York, where a defendant in ejectment produced no written title, but relied solely on possession with claim of title, he was held limited to that part under actual improvement. Jackson v. Warford, 7 Wend. R., 62.

* Johnston v. Irwin, 3 Serg. & Rawle (Penn.), 291; Draper v. Short, 25 Miss. (4 Jones), 197; Justice Story, in Green v. Cranch (U. S.), 229; Barr v. Gratz, 4 Wheat. (U. S.), 213; Jackson v. Howe, 14 Johns. (N. Y.), 405; Anon., 1 Haywood (N. C.), 466.

† Proprietors of Kennebec Purchase v. Skinner, 4 Mass. R., 416. In accord, C. J. Tilghman in Miller v. Shaw, 7 Serg. & Rawle, 129; opinion of Justice Gibson in same case; Holt v. Hemphill, 3 Ohio, 232. See 1 Allen (Mass.), 245.

‡ Scott v. Elkins, 83 N. C., 424.

§ Thomas v. Kelley, 13 Ire., 43. In North Carolina we have what we might call four different limitations in regard to real property: 1. The State is barred by thirty years; 2. The State is barred by twenty-one years if held under *color of title*. 3. Individuals are barred by seven years' adverse possession under

enters without color of title, there is nothing by which his possession can be constructively extended an inch beyond his occupation."

The State of New York has very wisely left but little ground for judicial controversy in reference to the character of possession requisite under the statute of limitations in regard to real estate.*

Holding under Color of Title.—If the claimant has no paper-title under which he claims then he must have "a substantial inclosure, an actual occupancy, a *pedis possessio*, which is definite, positive, and notorious." "Adverse possession must be marked by definite boundaries, and be regularly continued down to render it availing."† "But, when a party claims to hold adversely, a lot of land, by proving actual occupancy of a *part only*, his claim must be under a deed or paper-title."‡ This deed or paper-title extends the possession of a part to the bounds described by the paper.§ In this way one tenant in common, though entering lawfully, may take title for the *entirety* and *oust* the co-tenant by

color of title; 4. Individuals are barred in twenty years where the land is held adversely under "known and visible boundaries" *without color of title*. To bar the State in thirty years the possession must be adverse "under known and visible boundaries." *Battle's Revisal*, ch. 17, secs. 18, 20, 23.

* Sec. 10 provides: "For the purpose of constituting adverse possession by any person claiming title founded upon some *written instrument* or some *judgment or decree*, land shall be deemed to have been possessed and occupied in the following cases:

- "1. Where it has been usually cultivated or improved;
- "2. Where it has been protected by a substantial inclosure;
- "3. Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purpose of husbandry, or the ordinary use of the occupant;
- "4. Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied by the same length of time as the part improved and cultivated."

Sec. 12 provides: "... in cases where the person does *not* hold under some *written instrument*:

- "1. Where it has been protected by a substantial inclosure;
- "Where it has been usually cultivated or improved." *New York Revised Statutes*, vol. ii., part 2, ch. 4, title 2.

† *Kent in Jackson v. Shoemaker*, 2 John., 234; *Doe v. Campbell*, 10 John., 477; 1 John., 156.

‡ *Jackson v. Woodruff*, 1 Cow. (N. Y.), 285.

§ *Clapp v. Bromaghan*, 9 Cow., 552.

the adverse possession.* C. J. Smith, of North Carolina, says in a recent case:† “An entry under a deed or other instrument purporting to pass land and describing and defining its limits, is in law an entry into the whole tract, except as against a better title to a part not actually occupied, and not only are no visible boundaries necessary, but if they existed they would be controlled by the conveyance under which the entry was made. The principles governing in such case is thus stated by Ruffin, J.:‡ ‘Where one enters under a conveyance of some colorable title for the particular parcel of land, then the rule is that the possession of a part is *prima facie* possession of the whole not occupied by another, which may be safely acted on, as the documentary title defines the claim and possession.’” In the instance first stated by C. J. Smith he had reference to a case of *lappage*, for such is the case of *Scott v. Elkins* (or in that class of cases); but the case given by Ruffin, from whom he quotes, did not have reference to a *conflict* of titles. So in the first the “entry” is into the whole tract, except as against a better title to a part not actually occupied (that is to say, where the better title *laps* on the inferior, the claimant of the inferior must be actually on the interference.) In the case put by Ruffin the claimant may be in possession of *any* part, and his title is marked by the bounds of his paper, except as to a part *actually occupied* by another.

In a Circuit Court case§ Justice Story said: “Where a person enters into land under a claim of title thereto by a recorded deed,

* *Clapp v. Bromaghan*, *supra*; 1 East, 568; 1 Atk., 493; 11 East, 51; *Ricord v. Williams*, 7 Wheat. (U.S.), 60; *Ross v. Durham*, 4 Dev. & B., 54; 2 *Harris & McHenry* (Md.), 254.

† *Scott v. Elkins*, 83 N. C., 424. In accord, 10 Yer. (Tenn.), 59; 9 Hump. 714; 1 Cold., 530; 2 Sneed, 27; 3 Head., 432; 5 Sneed, 631.

‡ *Thomas v. Kelley*, 13 Ire., 43; see *Tredwell v. Reddick*, 1 Ire., 56; *Graham v. Houston*, 4 Dev., 232; *Thompson v. Cragg*, 24 Tex., 582; 18 Vermont, 294.

§ *Prescott v. Nevers*, 4 Mason Cir. Co. R., 330; see, in accord, *Johnson v. McMillan*, 1 Strobb. (S. C.), 143; *Jackson v. Porter*, Paine (Cir. Co.) R., 457; *Bynum v. Thompson*, 3 Ire. (N. C.), 578; 5 *Dana* (Ky.), 232; 23 Cal., 431; 37 *Miss.* (8 George), 155. To same purport see *Elliott v. Pearl*, 10 Peters (U.S.), 412; 11 Mart. (La.), 207; *Ewing v. Burnett*, 11 Peters (U.S.), 41. As to the effect of the statute of seven years in North Carolina and Tennessee see the case of *Patton's Lessee v. Eaton*, 1 Wheat. (U.S.), 476; also *Powell v. Harmon*, 2 Peters (U.S.), 241, *Angell, Lim.*, ch. 31, § 401, note 2.

his entry and possession are referred to such title, and that he is deemed to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described in any other person."

Chief Justice Parsons, of Massachusetts, has well expressed this principle. He says: "When a man enters on land, claiming a right and title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel; for in this case, an entry on part is an entry on the whole. When a man not claiming any right or title to the land shall enter on it he acquires no seisin but by the ouster of him who was seised; and, to constitute an ouster of him who was seised, the disseisor must have the actual, exclusive occupation of the land, claiming to hold it against him who was seised."* The same is held in New Hampshire, and Vermont, and South Carolina, and in fact this is the general doctrine in the States.†

What is Color of Title.—It may be stated, generally, that wherever the statute of limitations has designated a *paper*, as a grant from a certain State, deed from the Lord Proprietors, conveyance, deed of administrator, or other specific instrument, under which the possession must be held, *this paper*, by whatsoever name, is a "color of title." Thus the statute of Tennessee, after designating certain instruments, then says, "or *other* assurance purporting to convey a fee." In these States, therefore, where the statute confers title by the period of limitations and design-

* *Proprietors of Kennebec Purchase v. Springer*, 4 Mass., 416.

† *Waldron v. Tuttle*, 4 N. Hamp., 371; *Pearsall v. Thorp*, 1 Chip. (Vt.) R., 92; *King v. Smith*, 1 Rice (S. C.), 14; *Stanly v. Turner*, 1 Murp. (N. C.), 14; 2 *Haywood* (N. C.), 56; *Bowman v. Bartlett*, 3 Marsh. (Ky.), 99; *Bowie v. Brake*, 3 Duer (N. Y.), 35; 5 *Litt.* (Ky.), 210; *Sexton v. Hunt*, 1 *Spencer* (N. J.) R., 487; *Chiles v. Conley*, 9 *Dana* (Ky.), 385; *Alston v. Collins*, 2 *Speers* (S. C.), 460; *Hubbard v. Austin*, 11 *Vt.*, 129; *Bell v. Hartley*, 4 *Watts* (Penn.), 32; *Cheney v. Ringold*, 3 *H. & Johns* (Md.), 87; *Steadman v. Hilliard*, 3 *Rich.* (S. C.), 101; *Slize v. Derrick*, 2 *Rich.* (S. C.), 627; *Fitch v. Mann*, 8 *Barr* (Penn.), 503; *Waddle v. Stewart*, 4 *Sneed* (Tenn.), 534; *Franklin Academy v. Hall*, 16 *B. Mon.* (Ky.), 472; *Creech v. Jones*, 5 *Sneed* (Tenn.) R., 631. It has been held in Pennsylvania, in a case of *lappage* or interference of titles, that inclosing and cultivating part of the interference, and using the residue as adjacent woodland as customarily enjoyed, is actual possession of the whole. *Ament v. Wolf*, 1 *Grant* (Penn.), 518.

nates the "paper writing" under which the adverse possession must be had, but little difficulty can arise as to what is "color of title." But in so many of the States the matter has been left for judicial construction, we have a great variety of "expressions" and opinions on this point. The Supreme Court of the United States has said, "The courts have concurred, it is believed without an exception, in defining 'color of title,' to be that which in appearance is title, but which in reality is no title."* This decision arose in reference to the statute of Illinois, which uses the words "color of title," etc., and confers title.

As to what *instruments of writing* have been held to be color of title, and what not color of title, the cases cited in the note† may be consulted with profit, in addition to those stated in North Carolina.

The deed must cover, in its description, a tract of land of which that in actual possession is a component part.

In *Pillow v. Roberts*, the same court had said: "Statutes of limitation would be but of little use if they protected those only who could otherwise show an indefeasible title to land. Hence, color of title, even under a void and worthless deed, has always

* *Wright v. Mattison*, 18 How., 56. As to what does, and what does not constitute "color of title" in North Carolina, see *Campbell v. McArther*, 2 Hawks, 33; *Trustees, etc. v. Newbern Academy*, 2 Hawks, 233; *Dobson v. Murphey*, 1 Dev. & Bat. Law, 586; *Ross v. Durham*, 4 Dev. & Bat., 54; 4 Jones, 206; *Bynum v. Thompson*, 3 Ire., 578; *Watkins v. Flora*, 8 Ire., 374; *Roger v. Mabe*, 4 Dev., 180; *Dobson v. Erwin*, 4 Dev. & Bat., 201; *Callendar v. Sherman*, 5 Ire., 711, and *McConnell v. McConnell*, 64 N. C., 342, where the doctrine is discussed by Rodman, J.

† *County of Piatt v. Goodell*, 97 Ill., 84; 92 Ill., 280; *Beverly v. Burke*, 9 Ga., 440; *Riggs v. Fuller*, 54 Ala., 141; 68 Ill., 84; *Molten v. Henderson*, 62 Ala., 426; 42 Miss., 555; *Hamilton v. Wright*, 30 Iowa, 490; *Bell v. Coats*, 56 Miss., 776; *Thompson v. Borhans*, 61 N. Y., 60; *Finly v. Cook*, 54 Barb. (N. Y.), 9; *Munro v. Merchant*, 28 N. Y., 41; *Ladd v. Dubroca*, 61 Ala., 25; 52 Ga., 637; 89 Ill., 190; *Dalton v. Bank St. Louis*, 54 Mo., 105; *Pillow v. Roberts*, 13 How. U. S., 472; 33 Ga., 239; 44 Ga., 274; 20 Ga., 312; 36 Ala., 308; 34 Ark., 547; 68 Mo., 371; 38 Ala., 311; 47 N. H., 253; 58 Ga., 386; 50 Ga., 629; 44 Ga., 573; 56 N. H., 357; *Peck (Tenn.)*, 321; *Meigs (Tenn.)*, 207.

The foregoing are cases held as sufficient color of title; those following the paper were held *insufficient*: 33 Cal., 668; 33 Ohio St., 395; 54 Miss., 554; 15 Ill., 178; 25 Ga., 181; 62 Ill., 508; 23 Ill., 507; 12 Ill., 409; 36 Ala., 308; 20 Ga., 322; 86 Ill., 425; 14 Wend., 227.

been received as evidence that the person in possession claims adversely to all the world.”*

This case was in regard to the statute of Arkansas. But if the *paper*, upon its face, appears to be void, or is absolutely void under the law, the same is not a “color of title.”† In North Carolina, it is said: “To constitute color of title there must be some written document of title, *professing* to pass title to the land, which is not so obviously defective that it could not have misled a man of ordinary capacity. Hence, a sheriff’s *return* of a sale upon a *fi. fa.* is not color of title, for that is not understood by any man of ordinary capacity as either passing or professing to pass title.”‡ So, a *paper*, purporting to be a will, which has but *one* subscribing witness, and which has not been proven as a will, is not “color of title.”§

The State of California, and others cited in the note, hold substantially that “color of title” is “that which the law will consider *prima facie* a good title, but which, by reason of some defect, not appearing on its face, does not in fact amount to title,” or, in case of a deed relied on, “it must be such a one as might be valid.”|| In Missouri and Pennsylvania, it seems that a “written” assurance is not always required.¶ If a paper-title is offered, it is evidence of *bona fide* claim.**

Several of the States, as in Maryland, “the paper-title, to give

* *Pillow v. Roberts*, 13 How. (U. S.), 472; *Ewing v. Burnett*, 11 Pet., 41.

† *Moore v. Brown*, 11 How. (U. S.), 417; *Walker v. Turner*, 9 Wheat., 541; *Tillinghast’s Adams’s Ejct.*, 451; *Jackson v. Frost*, 5 Cow., 350.

‡ *Dobson v. Murphy*, 1 Dev. & Bat.’s Law, 586.

§ *Callender v. Sherman*, 5 Ire., 711; see also *Watkins v. Flora*, 3 Ire., 374; *Comrs. of Beaufort v. Duncan*, 1 Jones, 239. But, in *McConnell v. McConnell*, the court of North Carolina says, that if the *paper had been proven as a will*, then it would be “color,” although only *one* witness; see 64 N. C., 342.

|| *Bernal v. Gleim*, 33 Cal., 676; *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.), 522; *Jackson v. Frost*, 5 Cow., 351; *Baker v. Swan*, 32 Md., 355; *Kruse v. Wilson*, 79 Ill., 240; *Gittens v. Lowry*, 15 Ga., 338; *Roe v. Kersey*, 32 Ga., 155; *Tate v. Southard*, 3 Hawks N. C., 121; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.), 185. Under the act of 1819, in Tennessee, the question of “color of title” is well settled in that State, as it would seem. *McConnell v. McConnell*, 64 N. C., 342; see the doctrine as above authorities; *Stork v. Starr*, 1 Sawyer (Oregon), 20; 24 Ala., 352; 16 Ala., 595; 30 Iowa, 486; *Sedw. & Wait*, §§ 761, 765. ¶ *Cooper v. Ord*, 60 Mo., 547; 52 Mo., 108; *McCall v. Neely*, 3 Watts (Pa.), 72.

** See, as to this, *Abercrombie v. Baldwin*, 15 Ala., 372.

color, must be so far *prima facie* good in appearance as to be consistent with the idea of good faith.* The cases in Missouri, Pennsylvania, and also in Massachusetts, while holding that no "written" assurance is necessary, agree that, in the case of a mere intruder and pure trespasser, his possession is limited to the actual *possessio pedis*.

But these authorities say it is sufficient if there be "some visible acts, signs, or indications, which are apparent to all, showing the extent of the boundary."

Thus, in *Rannells v. Rannells*,† the case was that of a verbal gift of the party to his sister, and the lines and boundary being fixed by a survey. The possession being thus indicated by acts *in pais*, it was held to extend to the marks of the survey, and was called color of title. In *McCall v. Neely*,‡ the court say: "To give color of title, therefore, would seem not to require the aid of a written conveyance. . . . An entry is by color of title when it is made under a *bona fide*, and not pretended claim." This view is thus illustrated by Gibson, C. J., in this case; he says: "The words (color of title) do not necessarily import the accompaniment of the usual documentary evidence; for, though one entering by title, depending on a void deed, would certainly be in by color of title, it would be strange if another, entering under an erroneous belief that he is the legitimate heir of the person last seised, should be deemed otherwise."

The great results which flow from having "color of title" are: 1. To show the *animus* of the party holding; 2. To define the amount of his possession, and thereby give notice to the true owner.

In the case of a mere *trespasser*, without "claim of title" or "color of title," the adverse possession is limited to the *actual occupancy*, but where the party comes in under a color of title the same legal result follows which follows the holder of the *true*

* 32 Md., 355.

† *Rannells v. Rannells*, 52 Mo., 108. In accord, *Bell v. Longworth*, 6 Ind., 273.

‡ *McCall v. Neely*, 3 Watts (Pa.), 72. In these cases, the terms "claim" and "color" are confounded. In Iowa, a party may rely on either a "claim of title," or "color of title," but the terms are not synonymous: *Hamilton v. Wright*, 30 Iowa, 486.

title, that is, "possession of a part is the possession of the whole" (with the qualifications stated). It is true in case of the real owner the law gives him the *constructive* possession without being actually upon any part thereof, until that is disturbed by an adverse holding. The man without the true title, but holding a paper *purporting* to convey title, has nothing *while out of possession*, but must *enter* some portion thereof: *then*, and not until then, does the statute begin to run in his favor. And being in, by color of title, his foot upon a part, the law by construction extends the possession to the bounds of the color of title (there being of course no interference). In this regard the holder of the color (in extent of possession) has precisely what the true owner would have when actually in possession of a part. The confounding the terms "claim" with "color" is manifest in many of the cases, but perhaps it is of little consequence how the "claim" is manifested, whether by "writing" or by "acts in pais," if there be that *defining* of limit and *notoriety* of possession and the *adverse* character which put the statute in motion. Indeed, the "lines" fixed by *actual survey* might be more readily discovered than when the same lines are called for in a deed or other assurance. Then if a "claim of title" defines the extent, evinces the *intent*, and is notice to the true owner, it matters but little what it is called. It may certainly be so in that class of statutes which give the benefit of the same to a "claim of title" or holder of "color of title."

In the sense of many of these statutes, and in the more appropriate and accurate sense, "color of title" ought to appear from some written assurance purporting to pass land. The true owner has no *constructive* possession until he has a *paper title*, and it would seem that this constructive possession should result to no other except to one holding a *paper title purporting* to convey the land. No mere acts in *pais* would seem to be of equal force. But the language of the statutes is different, and hence the diversity of judicial language.

Indeed, Sedwick & Wait, in their recent work on the *Trial of Title to Land*, after reviewing all the cases, think that, possibly with the exception of Vermont, all the States require a *written instrument* before the doctrine of constructive possession

shall apply. They refer to the cases,* and say that *Rannells v. Rannells*, heretofore noticed, has not been sustained by the Missouri courts, and that the cases in Pennsylvania and Massachusetts have not gone so far. The cases of *Buck v. Squiers*† and *Hodges v. Edney* are supposed to make the holding of the Vermont courts differ from the general authority.

These authors consider that the case of *Bell v. Longworth*, *supra*, does not in strictness place the courts of Indiana in opposition to the general rule, but is rather an authority to show what may constitute actual possession.

But as to the effect of holding under "color of title," or claim of title, the authorities all agree substantially, and upon this point cases have already been mentioned; others will be referred to in note.

The language in the Missouri case of *Fugate v. Pierce*‡ will illustrate the idea in all the cases; it is there said: "The doctrine of constructive possession, which follows the title, when there is no adverse possession, is applied to one who takes actual or corporeal adverse possession under color of title, and he is held to be possessed of the contiguous land covered by the instrument under which he enters, and which he claims by virtue of such instrument."

It need scarcely be stated that if the color of title is so vague and indefinite as not to describe the possession and claim, the

* *Thompson v. Burhans*, 79 N. Y., 99; *Jackson v. Woodruff*, 5 Cow., 285; *Wells v. Iron Company*, 43 N. H., 530; *Long v. Higginbotham*, 56 Mo., 251; *Hughes v. Israel*, 73 Mo., 547; *Fugate v. Pierce*, 49 Mo., 441; *Scales v. Cockrill*, 3 Head. (Tenn.), 436; *Humbert v. Trinity Church*, 24 Wend., 604; *Sedw. & Wait*, §§ 769, 772. This is certainly the law in almost all the States.

† *Buck v. Squiers*, 23 Vt., 503; *Hodges v. Edney*, 38 Vt., 348.

‡ *Fugate v. Pierce*, 49 Mo., 447. In accord are the following cases: *Hodges v. Edney*, 38 Vt., 344; *Chapman v. Templeton*, 53 Mo., 465; *Washburn v. Cutter*, 17 Minn., 361; *Wilson v. Williams*, 52 Miss., 493; *Cunningham v. Frandzen*, 26 Tex., 38; *Pepper v. O'Dowd*, 39 Wins., 544; *Chandler v. Rushing*, 38 Tex., 596; *Powell v. Davis*, 54 Mo., 318; *Bailey v. Carleton*, 12 N. H., 15; *Phillippi v. Thompson*, 8 Oregon, 436; *Coleman v. Billings*, 89 Ill., 188; *Humphreys v. Huffman*, 33 Ohio St., 404; *Thompson v. Burhans*, 79 N. Y., 99; *Elliott v. Pearl*, 10 Peters, 442; *Edge v. Medlar*, 82 Penn St., 87; *Thomas v. Kelley*, 13 Ire., N. C., 43. *Scott v. Elkins*, 83 N. C., 424; *Dobson v. Murphey*, 1 Dev. & Bat. Law, 586; see other cases cited in this chapter, under the present head; also, *Lea v. Polk County Copper Co.*, 21 How. (U. S.), 120.

holder thereof gains no benefit from the same, and the adverse possession is limited to the actual possession.*

It is not always necessary to describe a tract of land by its abutments; such designation as the "Home Place" is sufficient. Thus it was said, for example, "Mount Vernon, the late residence of General Washington," is better known by that name than by a description of it as "situate on the Potomac River, and adjoining the lands of A., B., and C."†

Qualification of the Rule that Possession of a Part gives Constructive Possession of the Whole.—It is said generally that the constructive possession extends to the metes and bounds of the paper which is recognized as color of title, but this rule has some qualification.

Thus, in New York, it is said: "The part not actually possessed must be for use with or subservient to that actually possessed, and have some necessary connection therewith."‡ Then, again, it is said: "Such constructive possession will extend only to such land as is used in connection with the improved land actually possessed, and to only so much as is reasonable and proper for that purpose, according to the custom of the country."

Hence, it was held, that a party claiming under a void tax deed some six thousand acres of wild land, but having sufficient actual possession of less than a quarter of an acre, he had no constructive possession of the land not actually possessed.

And, in this case, the further facts that he had paid taxes, had it surveyed, and had at times cut logs and roads upon the lands, were held not sufficient to extend the constructive possession. The following reasons were given for this qualification of the rule by the court of New York, in *Jackson v. Woodruff*: "Possessions thus taken under a claim of title are generally for the purpose of cultivation and permanent improvements."

* *Humphreys v. Huffman*, 33 Ohio St., 404; *Ellicott v. Pearl*, 10 Peters, 442; *Shackleford v. Bailey*, 35 Ill., 387; *Henley v. Wilson*, 81 N. C., 405; *Smith v. Low*, 2 Ire. N. C. Law, 457.

† *Proctor v. Pool*, 4 Dev. Law (N. C.), 370; *Ritter v. Barrett*, 4 Dev. & Batt., 133; *Kitchen v. Herring*, 7 Ire. Eq., 190; *Henley v. Wilson*, 81 N. C., 405; *Fouke v. Kemp's Lessee*, 5 Harr. & Johns. (Md.), 135; 2 Leigh (Va.), 1.

‡ *Thompson v. Burhans*, 79 N. Y., 100. In accord, *Jackson v. Woodruff*, 4 Cow. (N. Y.), 276; *Chandler v. Spear*, 22 Vt., 406; *Pepper v. O'Dowd*, 39 Wins., 538, 550.

It is generally necessary to reserve a part of the wood land. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined. The court argues, that as to cases of this character it is believed that no well-grounded complaint can be urged against the operation of the principle that the constructive possession should extend to the boundary of the paper-title; "but the attempt to apply the same rule to cases where a large tract is conveyed will be mischievous indeed."

Reference has already been made to the fact that the decisions are not exactly uniform as to the effect of the constructive possession. The case of *Lenoir v. South*,* and the reasoning in the case of *Green v. Harmon*,† have already been mentioned in this chapter, under the head, "What constitutes a possession in law." There is but little difference among the authorities as to what constitutes possession; but, being in possession of a part, under color of title, the difficulty is in extending this possession by construction to the part not occupied. The case of *Lenoir v. South*, *supra*, evidently does not qualify the rule with the same strictness as the court does in the case of *Thompson v. Burhans*, *supra*, and the force of the reasoning in the latter case is admitted.

But there must be some general rule, and that general rule holds that *actual, adverse, open, and notorious* possession of a part, under *color of title*, gives the possessor title to the extent of the boundary of the paper-title. The exceptional cases of very large tracts of land, with a slight, unimportant possession, may be a reason for exceptions to the general rule; but uniformity and the stability of titles require as few exceptions as possible to the rules of law affecting the title to land.

It should be stated, however, that the actual, partial possession, and the color of title must be coexisting, so that the constructive possession given by the paper-title cannot relate back to the time when actual possession commenced, but *before* color of title was acquired. The statute begins to run in favor of the

* *Lenoir v. South*, 10 Ire. (N. C.), 237.

† *Green v. Harmon*, 4 Dev. Law, 158, *supra*. In accord with these cases see *Tritt v. Roberts*, 64 Ga., 156; *Janes v. Patterson*, 62 Ga., 527; *Fugate v. Pierce*, 49 Mo., 447.

adverse constructive possession only from the time when both actual possession and color of title concur.*

It must not be forgotten, however, that where the legal owner takes actual possession of the premises, or a part thereof, the constructive possession of the former adverse claimant is destroyed, and will be thereafter confined to his *possessio pedis*. This is upon the principle that, in mixed or conflict of possessions, the constructive possession always follows the *true* title.

How to Arrest the Running of the Statute.—Under the statute of 21 James I., in case of a wrongful entry by the trespasser, the true owner could arrest the running of the statute by a peaceable entry within the twenty years; but, if the party did not go out, the true owner must sue within a year and a day, as fixed by 4 and 5 Ann, ch. xvi.† But in Tennessee it is held that the common-law doctrine of "entry by the true owner" is changed by the second section of the Act of 1819, and the only way to arrest the running of the statute after it begins to run is a "*suit effectually prosecuted*."‡

So, generally, the American statutes require a "suit," even where the entry is effectual, to stop the running of the statute. Of course if the entry or possession of the true owner is acknowledged and recognized by the party holding against the true title, this will arrest the running of the statute.

Continuity of Possession.—If one merely enters and commits a trespass and then *goes off*, and another comes after him and commits a trespass, there is no *privity* between them, and their possessions cannot be connected. There must be privity of estate, or the several titles must be connected before they can be "*tacked*," as it is called sometimes:§ the possession of the landlord and

* *Watson v. Tindall*, 24 Ga., 494; *Cooper v. Ord*, 60 Mo., 420; *Sedw. & Wait*, Title to Land, § 774.

† 3 Black., 175.

‡ *Norvell v. Gray's Lessee*, 1 Swan, 96, opinion by Judge McKinney, overruling an able argument to the contrary made by Jos. B. Heiskell, a lawyer of eminent ability.

§ *Melvin v. Proprietors of Locks, etc.*, 5 Metc. (Mass.), 15; 10 Barr. (Penn.), 224; *Christy v. Alvord*, 17 How. (U. S.), 601; *Doswell v. De La Lanza*, 20 How. (U. S.), 29; *Wheeler v. Mody*, 11 Texas, 372; *Angell, Lim.*, § 413; *Benson v. Stewart*, 30 Miss., 57; 119 Mass., 415; 38 Texas, 595; *Riggs v. Fuller*, 54

his tenant, of an ancestor and his heirs, of vendor and vendee, or by members of the same family.* There can be no privity among wrong-doers, and therefore the possessions cannot be connected.

As to the continuity of the possession, it has been said the occupation must be such "as to show an uninterrupted exercise of ownership, or continued assertion of right, and liability at all times to the possessory action of the owner."†

Another case has said: "The possession should be such as to leave no doubt on the mind of the true owner, not only who the adverse claimant was, but that it was his purpose to keep him out of his land."‡ As expressed he must "keep his flag flying."

In the case of *Armstrong v. Morrill*, Mr. Justice Clifford, of the Supreme Court of the United States, said: "Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations."§ In the same case it is said that "secret possession will not do, as publicity and notoriety are necessary as evidence of notice and to put those claiming an adverse interest upon inquiry." "Acquiescence," upon which the whole doctrine of adverse possession rests, cannot be presumed, unless the owner has, or may be presumed to have, notice of the possession.||

Pleading of the Statute—Ejectment.—In the old action of ejectment, being purely a possessory action, the general issue, "not guilty," allowed the defendant to rely upon the statute of limitations or other defence which showed the plaintiff not entitled to the possession, and such is the present holding of the Supreme

Ala., 146; see *Clark v. Chase*, 5 Sneed (Tenn.), 636; *Baker v. Hale*, 6 Baxter (Tenn.), 46; *Jackson v. Leonard*, 9 Cow. (N. Y.), 653; 31 Conn., 531.

* *Hammett v. Blount*, 1 Swan, 385; 10 Hump., 24; 1 Cold., 302.

† *Holdfast v. Shepherd*, 6 Ire. (N. C.) Law, 365. In accord, *Moss v. Scott*, 2 Dana (Ky.), 274; *Trotter v. Cassady*, 3 A. K. Marsh (Ky.), 366.

‡ *Denham v. Hollman*, 28 Ga., 191; *Gudger v. Hensley*, 82 N. C., 56.

§ *Armstrong v. Morrill*, 14 Wall., 146; *Foulke v. Bond*, 12 Vroom (N. J.), 527.

|| Sed. & Wait, §§ 735, 736; *Moore v. Thompson*, 69 N. C., 121; *Turpin v. Sanders*, 32 Gratt. (Va.), 27; *Thompson v. Pioche*, 44 Cal., 508; *Wing v. Hall*, 47 Vt., 182. See New York and other statutes as to what constitutes adverse possession.

Court of the United States.* The defendant, likewise, if not a mere trespasser or intruder, may show title out of the plaintiff, at the commencement of the suit, without connecting himself with the outstanding title in any way. This is founded upon the well-established rule in ejectment that the plaintiff must recover solely upon the strength of his own title, and this he fails to do if it appears that the title is in another not a party to the suit.†

But under the practice adopted in the statutory ejectment and the code system of pleading in the different States, the decisions are not uniform. Thus, in North Carolina under the code practice, which abolished the action of ejectment, still holds that the statute of limitations need not be pleaded or set up in the answer; the reason assigned being, that the inquiry in the action to recover land is intended to ascertain whether or not the plaintiff has title to the land claimed, not whether the defendant has no title.‡ This decision is consistent with the theory of the courts in North Carolina, as no special action is provided by the code for ejectment,§ and they hold that in abolishing the technical action of ejectment and prescribing what the complaint may contain, it was not intended to surrender any of the advantages of the action of ejectment, and that the rules of law and practice in most substantial respects prevail as under the technical action. This seems to be what is indicated in *Harkey v. Houston*,|| decided soon after the new code took effect.

In Mississippi it has been decided under the pleading Act

* *Hogan v. Kurtz*, 94 U. S., 773; *Stearns on Real Actions*, 241; *Taylor v. Horde*, 1 Burr, 119, per Lord Mansfield; *Adams on Eject.*, 4 (Am. Ed.), 302.

† But it seems that this *outstanding title* should be a complete *subsisting title*, not barred by the statute of limitations, or for other cause void, and therefore if the plaintiff, after he brings suit, should discover an outstanding better title, and purchase the same and take deed, the defendant could not rely on the same. In reply to the defendant's showing an outstanding title at the commencement of the suit, the plaintiff shows title in *himself*. Should the defendant, who admits he has no title, repel the plaintiff, who is thus shown to be the true owner?

‡ *Freeman v. Sprague*, 82 N. C., 366; *Davis v. McArthur*, 78 N. C., 357.

§ *Woodley v. Gilliam*, 64 N. C., 649.

|| *Harkey v. Houston*, 65 N. C., 137. Notwithstanding the holding in *Freeman v. Sprague* the code provides: "But the objection that the action was not commenced within the time limited can only be taken by answer." *Battle's Revisal*, ch. 17, sec. 16.

of 1850 that the defendant can set up the statute of limitations by special plea,* in Alabama and Illinois, and perhaps others, the defendant need not plead the statute of limitations,† but the defence is admissible under the general issue.

In Wisconsin, if the statute of limitations is relied on in ejectment, it must be pleaded.‡ So, under the practice in California, title by adverse possession cannot be shown under the general denial.§ In Texas the plea of not guilty in trespass to try title lets in all defences, except the statute of limitations.|| In New York adverse possession must be pleaded, and evidence of title so acquired cannot be given under the general issue.¶ Under the present English system, by the Procedure Act of 1852, and the statute of limitations of 3 and 4 Will. IV., the statute is never pleaded; neither was it done under the previous limitations of 21 James I., ch. 16, §§ 1 and 2. The plaintiff must prove a title *not barred by the statute*.**

Tenants in Common—One under Disability—Others not.—If several tenants in common, having a cause of action, one of whom is under disabilities and the others not, those under no disabilities will be barred by the statute, while the one under disabilities may recover. Each tenant in common has a right to sue and recover his interest; therefore, it is no excuse to say that a co-tenant was under disabilities.††

The rule is different as to the joint-owners of personal property :

* Tegarden v. Carpenter, 36 Miss., 404.

† Lay's Exrs. v. Lawson, 23 Ala., 377; Stubblefield v. Borders, 92 Ill., 279; see Wicks v. Smith, 18 Kan., 508.

‡ Lawrence v. Kenney, 32 Wins., 281; 25 Wins., 672.

§ McCreery v. Duane, 52 Cal., 262; see also 52 Cal., 257.

|| Dalby v. Booth, 16 Tex., 563.

¶ Butler v. Mason, 16 How. Pr. (N. Y.), 546; Sands v. St. John, 36 Barb., 628; Sedw. & Wait, § 482.

** Cole on Ejectment, p. 6; Taylor & Atkins v. Horde, 2 Smith Lead. Cas., 324, 389. In trespass *quare clausum fregit*, it may be necessary and expedient for the plaintiff to reply specially the statute of limitations (Cole, Eject., p. 6).

†† Jackson v. Bradt, 2 Caines R., 159; Riggs v. Dooley, 7 B. Mon. (Ky.), 236; Moore v. Armstrong, 10 Ohio, 11; Wade v. Johnson, 5 Hump., 117; Jordan v. Thornton, 7 Ga., 517; 2 Barb. (N. Y.) Ch., 314; Wells v. Rayland, 1 Swan (Tenn.), 501. In South Carolina the rule is different, Lahiffe v. Smart, 1 Bail. (S. C.) R., 192. As to rights of tenants in common to sue in ejectment, see Barrow v. Nave, 2 Yerg., 228; 3 Hawks (N. C.), 577.

if one is free from disabilities, and neglects to sue within the period fixed by the statute, the joint action is barred, and so the interests of all are barred.*

Cumulative Disabilities.—Statutes of limitation provide certain exceptions in favor of infants, married women, persons insane, beyond seas, etc.; these persons are said to have a *disability*; but this saving clause only extends to the person on whom the right first descends. When the statute has once begun to run, it will continue to run without being impeded by any subsequent disability. The disability of *infancy* and *coverture*, for instance, cannot be *tacked* so as to avoid the statute.† The party can only avail himself of the disability *existing* when the right of action first accrued. Nor can there be any tacking of disabilities existing in different persons, as the mother upon that of the children.‡

If the statute begins to run against the ancestor or devisor, it continues to run after his death, notwithstanding the infancy of the heir or devisee.§ There is no difference between voluntary and involuntary disabilities.||

So, if the party is an *infant* when the *cause of action* accrues or title descends, and marry before she is twenty-one, she can take the advantage of the saving of the statute in favor of *infancy* only.¶

Where Several Disabilities exist together.—If, however, at the time the adverse possession begins, the owner of the estate has several disabilities which exist *together*, as *infancy* and *insanity*, he is not bound to sue until all are removed. Says Lord Hardwicke: "If a man both of non-sane memory and out of the

* 2 Head. (Tenn.), 276; 2 Yerg., 227; *Marsteller v. McLean*, 7 Cranch (U. S.) R., 156; 4 Tenn., 516; *Riden v. Frien*, 2 Murph. (N. C.), 577; 4 Bibb (Ky.), 412.

† *Currier v. Gale*, 3 Allen (Mass.), 328; *Mercer v. Selden*, 1 How. (U. S.), 37; *Dease v. Jones*, 23 (Miss.); 1 Cush., 133; 8 Ala., 253; *Stephens v. Bornor*, 9 Hump., 546; 16 How. (U. S.), 247; 6 Tex., 222.

‡ *Mitchell v. Berry*, 1 Met. (Ky.), 602.

§ *Pierce v. House*, N. C. Term R., 305; 2 Green (N. J.), R., 294; *Rankin v. Tenbrook*, 6 Watts (Pa.), 388; 1 How. (U. S.), 37; 9 Leigh (Va.), 495; 8, Hump., 298; *Bennett v. Williamson*, 8 Ire. (N. C.), 121; *Flemming v. Griswold*, 3 Hill (N. Y.), 85; 29 Barb. (N. Y.), 319; *Angell, Lim.*, 477, 479.

|| *Angell, Lim.*, 478; *Frewell v. Collins*, 3 Brev. (S. C.), 286.

¶ *Eager v. Commonwealth*, 4 Mass., 182; 2 Conn., 298; 3 Johns. (N. Y.), ch. 129.

kingdom come into the kingdom, and then go out of the kingdom, his non-sane memory continuing, his privilege as to being out of the kingdom is gone, and his privilege as to non-sane memory will begin from the time he returns to his senses.”*

Mr. Angell, in a note, calls attention to *Wilson v. Kilcannon*,† and to *Davis v. Cooke*,‡ as sustaining the position the opposite to that here stated. They were supposed to hold that an infant, having a right of action, marries before coming of full age, she is not bound to sue within the time prescribed after coming of age; her coverture protects her. But the case of *Wilson v. Kilcannon* was overruled by the Tennessee court in the subsequent case of *McDonald v. Johns*,§ and the North Carolina case of *Davis v. Cooke* cannot be considered as authority; the court, in deciding the case, even said that such was not the proper construction of the act of limitations, but thought that such a construction had been acquiesced in, and but little reason is given for the opinion. Besides, it is an early case, before the doctrine had been so fully discussed.

The Lapping or Interference of Titles.—The effect of the entry of a party into possession under a deed, grant, or other paper title, has been fully shown, that is to say, such person holds to the “metes and bounds” of the paper-title, although he be in possession of only a small part. And, as a further result of our law, if the real owner be not in the possession of any part of the land covered by the paper writing, he has what is called the *constructive* possession; that is, such possession as the law carries to the owner by virtue of his title only. If he is in possession of any part of the land covered by the title-deed, he is *actually* in possession of the whole, until some one else takes actual possession of some part, as we shall see further along.||

* *Start v. Mellish*, Atk., 610; *Angell, Lim.*, 198.

† *Wilson v. Kilcannon*, 4 Hay (Tenn.) R., 182.

‡ *Davis v. Cooke*, 3 Hawks (N. C.), 608.

§ *McDonald v. Johns*, 4 Yerg., 258. But this question is at rest, now, by the statute in North Carolina. The 48th sec., of ch. 17, says: “No person shall avail of a disability unless it existed when the right of action accrued.” Sec. 49 provides: “Where two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed.” *Battle's Revisal*, ch. 17, §§ 48, 49. (See *Code of Tenn.*, § 2757.)

|| *Graham v. Houston*, 4 Ire. Law (N. C.), 232; see also, the important case of *Carson v. Burnett*, 1 Dev. & Bat. (N. C.), 547.

But this rule of the possession being coextensive with the paper-title, applies to both the *real* owner and to the *claimant* who enters under the inferior title, *when* there is no *conflict*, such as we now propose to show.

In the first place, the color of title is only rendered available as against the true title when such possession as the law recognizes has been had. But suppose when the claimant enters under his paper-title, fixing the bounds, that he finds on examination that a *part* of the land covered by *his* paper is covered by a *superior* title, and that the owner of such superior title is not in the possession of that part covered by *both titles*. Then, if the claimant would bring himself within the rule which allows him to hold to the *metes and bounds*, he must take actual and positive notorious possession of that part covered by *both titles*, or enough of it to give the title in law to the entire boundary of the paper under which he enters.

In *Dobbins v. Stephens*, Ch. J. Ruffin thus explains this position in case of lappage of deeds:* "If neither claimant be in the actual possession of the land covered by both deeds, the seisin is in the owner; but if one of them be seated on that part, and the other not, then the possession of the whole interference is in the former." But, suppose both claimants have possession of the lappage, in that event, Judge Ruffin says, in the same case: "But if both have actual possession on it (the interference), the possession of the whole is in neither; that of the owner extending by virtue of his title to all not actually occupied by the other; and that of the latter being limited to his *actual occupation*." "If the person who claims under the elder title have no actual possession of the *lappage*, such possession, although for a part only, by him who has the junior title for seven years, gives title to the whole."†

* *Den v. Harmon*, 4 Dev., 158; *Dobbins v. Stephens*, 1 Dev. & Bat. Law, 6. To the same effect, *Brimmer v. Proprietors of Long Wharf*, 5 Pick. (Mass.), 131; *Gilman v. Winslow*, 10 Mass., 151; *Mather v. Ministers of Trinity Church*, 3 Serg. & Rawle (Penn.), 509; *Orbison v. Morrison*, 1 Hawks (N. C.), 468; *Davidson's Lessee v. Beaty*, 2 H. & McHen. (Md.), 621; *Livingston v. Peru Iron Co.*, 9 Wend. (N.Y.), 511; *Stewart v. Harris*, 9 Hump., 714; *Cushman v. Blanchard*, 3 Greenl. (Me.), 266; *Barr v. Gratz*, 4 Wheat. (U. S.), 213; 20 Howard, 255; 1 Head (Tenn.), 40; 4 Bibb (Ky.), 257; *Talbott v. McGavock*, 1 Yer. (Tenn.), 262; Angell, Lim., ch. 31; *Scott v. Elkins*, 85 N. C., 424; 1 Hump. (Tenn.), 163; 2 Sneed (Tenn.), 196.

† *Kerr v. Elliott*, Phillips' Law (N. C.), 601.

"In order that the possession of one claimant shall neutralize another, both must be in the actual possession of some part of the *disputed land*."*

In the case of *Den ex dem. Green v. Harmon*, C. J. Ruffin used the following language: "If there be two patentees, the entry of the younger on his own land does not oust the other, unless it be on the part of the land which is covered by both titles; and, if it be on *that* part, the possession is confined to the actual occupation, if the elder be also in possession of any part of the same land which is included in both."

C. J. Parsons says: "Although there may be a concurrent *possession*, there cannot be a concurrent *seisin* of land; and, one only being seised, the possession must be adjudged to be in him, because he has the best right."† In Maryland and Pennsylvania this principle has been well expressed.‡

This doctrine was stated as follows in another case in North Carolina:§ "But his possession of the whole, in virtue of his actual possession of a part, is true only so long as no other is in the actual possession of any part. As soon as another takes possession of any part, either with or without title, the plaintiff loses the possession of that part."

And it was further said in the same case: "When the owner is actually possessed, by residence, for instance, of part of a tract of land, he is actually possessed of the whole that his deed covers, whether within inclosures or not, unless another either actually occupies adversely a part, and thereby destroys the first possession as to that part, or unless part of the land be covered by both deeds, and neither claimant be seated on *that part*, but each is on *other portions* of their respective tracts, in which case the *actual possession* of what is within *both* deeds is adjudged in him who has the title."

* *Michell v. Churchman*, 4 Hump. (Tenn.), 218.

† *Langdon v. Potter*, 3 Mass. R., 219.

‡ *Gitting's Lessee v. Hall*, 2 H. & Johns. (Md.), 112; *Hammond v. Ridgely*, 5 H. & Johns. (Md.), 245; *Hull v. Powell*, 4 Serg. & Rawle (Penn.), 465; *Mather v. Trinity Church*, 3 Serg. & R., 509.

§ *Graham v. Houston*, 4 Dev., 236. See, also, *Fitzrandolph v. Norman*, N. C. Term Reports, 132. See further, as to *lapped* patents in this State, *Williams v. Buchannon*, 1 Ire., 535; *Smith v. Ingram*, 7 Ire., 175; *Williams v. Miller*, *Ibid.*, 186; *Baker v. McDonald*, 2 Jones, 244; *McCormick v. Munroe*, 3 Jones, 332; *Carson v. Burnett*, 1 Dev. & Bat., 546.

The fact that the Owner is not in Actual Possession of a Part makes no Difference; the Claimant under Inferior Title must have Actual Possession to give a Cause of Action.—If the owner is in the actual possession of any part of the land covered by his title, he has the actual possession of the whole. But if the real owner is not in possession of any portion covered by his paper-title, he has the *constructive* possession of the whole.

So that the true owner always has the possession, either *actual* or *constructive*, until he is *ousted* of his actual possession, or his *constructive* possession is *arrested* by the *intruder*, and this *intruder* may be either with or without color of title. If without color of title, the possession is *ousted* only to the extent of actual occupation; but, if he enter under color of title, he may hold to the metes and bounds thereof under the conditions to be stated.

In either event the entry and possession must be upon the part covered by the true title, for until that is done no cause of action arises to the true owner, although the claimant of the inferior title may be in the actual possession of a part of his land as claimed, but outside of the elder title.

It takes an actual *possessio pedis*, so to speak, on the part of the claimant under the inferior title to *oust* the *actual* or *arrest* the *constructive* possession of the true owner. When this is done the statute begins to run against the owner, and not before.

In *Carson v. Burnett** the question was presented as to what kind of possession was requisite to arrest the *constructive* possession of the owner, he not being in actual possession.

And it was held that if the person having the better title was not in the actual possession of any part of the land, and the owner of the other title is in possession outside the interference, the latter has not, in law, possession of the interference. The question in this case arose upon the following charge of the judge below:

* *Carson v. Burnett*, 1 Dev. & Bat., 547. When the claimant under the junior title takes actual possession of the *lappage*, then the whole *interference* is in his possession, for the reason that he may then be sued for the whole, the owner not being on the same. *Carson v. Burnett*, 1 Dev. & Bat., 547; *Trimble v. Smith*, 4 Bibb (Ky.), 257; *Smith v. Mitchell*, 1 Marsh. (Ky.), 207; *Talbot v. McGavock*, 1 Yerg. (Tenn.), 262. The *intruder* must make an entry on "the disputed land." See *Talbot v. McGavock*, 1 Yerg., 262; 1 Hump., 163; 4 Sneed, 534; 9 Hump., 399.

"Where the holder of the elder title was in possession of no part of the land covered by his title, and he who had the younger title was in possession of any part of the land covered thereby, although such possession might not be within the lappage, the law adjudged his possession coextensive with his title, notwithstanding its lappage upon an elder title, of which there was no possession."

This charge was held very properly to be against law. Ch. J. Ruffin (from whom we draw so much profound learning in land law) said in reference to this charge: "The error, as it seems to us, has its root in the assumption of fact, which is not warranted by the law, and is contrary to a legal presumption. It assumes that the true owner is not in possession. Now that cannot be, unless another have the actual possession; for, by force of his title, he has constructively the possession until it be destroyed by an adverse possession, and there can be no adverse possession against which the owner cannot have an action to recover the possession. The question is, what sort of possession in another will terminate that which the owner has by construction, so as to enable him to say that he is out of possession and to demand it from the other? Certainly, as we think, it must be an actual possession of some part of *his* land. If the possession be outside the interference he cannot maintain ejectment; for that can be done only by showing a trespass on the premises, *described in the declaration*, that is, within the boundaries of his own deed. . . . It is not correct to state, therefore, that the owner is out of possession because he is not actually seated on any part of his land. His possession exists in his whole tract, until some part of *that* be usurped by another, so as to oust him from that part, and there can be no such usurpation but by occupation within the better title."*

Ejectment may be sustained, although it appears that the plaintiff and the defendant are both living on different parts of the same land in dispute, claiming adversely to each other.†

* If two parties be in actual possession, one claiming the legal title, the other an equitable title founded in parol as a resultant trust, the possession is neutralized. The statute does not run in favor of either of the parties as against the other. 3 Sneed, 242.

† Dobbins v. Stephens, 1 Dev. & Bat. Law, 5.

Both having actual possession on it, the possession of the whole is in neither; that of the owner extending, by virtue of his title, to all not actually occupied by the other, and that of the latter being to his actual occupation. In bringing ejectment, instead of trespass, the owner disavows the possession of the whole.

In other words, he is disseised of a parcel of his estate. Perhaps in this case the owner after making the entry could bring trespass against the tortious possessor, upon the idea of the resumption of the exclusive possession, which is allowable in the anxiety of the law to support right and to advance all remedies for an acknowledged wrong.*

In some of the States this doctrine of *constructive* possession of lands held under color of title by the cultivation of a part has been modified by the reference to the *nature* of the land. Says Mr. Angell: "That the doctrine is strictly applicable to a single lot of land, or to a single farm, there can be no doubt; but, in respect to land so held and not purchased with a view of actual cultivation, the case is obviously different."†

Judge Woodworth, of New York, in giving the opinion in *Jackson v. Woodruff*,‡ said: "The doctrine of adverse possession applied to a farm or single lot of land, is, in itself, reasonable and just. In the first place, the quantity is small. Possessions, thus taken under a claim of title are, generally, for the purpose of cultivation and permanent improvement. It is generally necessary to reserve a part for woodland. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined.

* See the reasoning of the court in *Dobbins v. Stephens*.

† Angell, *Limitations*, § 403.

‡ *Jackson v. Woodruff*, 1 Cow., 286; see also *Ten Eyck v. Richards*, 6 Cow. (N. Y.), 623; *Hunter v. Chrisman*, 6 B. Mon. (Ky.), 463; *Chandler v. Spear*, 22 Vt. (7 Washb.), 388.

But in the case of *Lenoir v. South*, 10 Ire., 237, it was held, in North Carolina, that actual possession for seven years under color of title, though of a very small portion, about three rods square, that it was during the time enlarged to three acres and in the midst of the woods, three-quarters of a mile from any dwelling, would give title to the metes and bounds of the paper-title. Judge Ruffin admitted it might appear at first as a hard case, as there were wild lands in the western part of the State, but held that such was the law.

"Frequent acts of ownership, in parts not cultivated, give notoriety to the possession; but the attempt to apply the same rule to where a large tract is conveyed would be mischievous indeed. Suppose a patent granted to A. for 2000 acres; B., without title, conveys 1000 of the tract to C., who enters under the deed, claiming title, and improves one acre only; this considerable improvement may not be known to the proprietor, or, if known, is disregarded for twenty years. Could it be gravely urged that here was a good adverse possession to the 1000 acres? If it could, I perceive no reason why the deed from B. to C. might not include the whole patent, and, after the lapse of twenty years, equally divest the patentee's title to the whole, for there would exist an actual possession of one acre, with a claim of title to all the land comprised in the patent. No such doctrine was ever intended to be sanctioned by the court."

In the case of *Green v. Harmon*,* in settling the doctrine of *lappage*, the court of North Carolina indicated quite strongly that the possession on the *lappage* should be something more than a very minute possession, which the owner might fairly mistake the character of the possession. The court say: "It may properly be declared that it must be of as much as will reasonably denote, both to the other proprietor and to the jury, that the party intended to usurp possession," etc. The point suggested was that a minute possession of this kind on the *lappage* would not protect the claimant under color beyond the actual occupation. It would seem that this reasoning should apply more strongly to an entry into a large, wild, uncultivated tract of land; for, in the case of *lappage*, the claimants most usually live on some part of their respective tracts, and, therefore, a better opportunity to have knowledge of an occupation, though small.

* *Green v. Harmon*, 4 Dev. Law, 158.

In the case of *Harris v. Maxwell*, 4 Dev. & Bat., 241, the North Carolina court, in holding that thirty-five years' adverse possession would presume a grant, said the holding must be up to "lines and boundaries well known," but that actual possession need not extend to these lines, the possession of a part being the possession of the whole. It was also held in this case that the Act of 1791 (barring the State in twenty-one years under certain color of title) did not affect the doctrine of the common-law presumption of a grant.

CHAPTER X.

WHEN TITLE IS FOUNDED ON EXECUTION SALE.

DURING the feudal system, when the tenant could not alienate his lands, it followed but reasonably that the same could not be taken by execution at the instance of the general creditor. "*Execution, executio*, signifieth in law the obtaining of actual possession of anything acquired by judgment of law, or by a fine executory levied, whether it be by sheriff or by the entry of the party."* The writ which authorizes the officer to so carry into effect such judgment is called an execution. It is now the most usual mode of obtaining the benefit of a judgment.

Says Mr. Freeman, in his work on Executions, page 1: "Theoretically, a judgment is the end of the law. It permanently settles disputed issues of fact, and applies to the facts, as thus settled, established principles of law. It declares the respective obligations of the litigants in regard to the matters which they have chosen to submit to the decision of the court. Practically, a judgment may be as far from the end as it is from the beginning of the law. The declaration of a right, or the permanent and unalterable establishment of an obligation, can, of itself, have no practical force except as it operates on the private or the public conscience; and, unfortunately, people who have engaged in a long and perhaps bitter litigation are likely to emerge with consciences so dulled towards each other that they will respond to nothing less than the practical forcing power of the law. Even where this state of mind has not been produced, the losing party, through his inability to discharge the established obligation, may make it indispensable to call in aid the final process of the law."

It is not the purpose here to discuss the different kinds of executions, and their separate qualities, and the results to be obtained by each, but only those issued against *lands*. An interesting treatment of the subject of executions may be found in the recent work of Freeman on Executions.

Land, when left free to commerce, was very soon made subject

* Coke, Littleton, 154.

to execution for the payment of debts, first, in behalf of the king only, and, by the statute of merchants, the privilege was extended to merchants, and finally, by 13 Edward I., chap. 18, the right to subject lands to the payment of debts was extended to creditors in general, with the qualification that only half of the debtor's land could be taken.

Under this statute, the sheriff could deliver to the plaintiff the chattels of the debtor, and one-half of his land, to be retained until the debt was satisfied. It will be observed that the sheriff did not sell the property, but the creditor was allowed to use the same until the use thereof and the rents and profits would pay the debt.

The Elegit.—The writ of execution issued under the statute of 13 Edward I., chap. 18, is called an *elegit*, and the creditor being placed in possession of one moiety of the lands of his debtor, became a tenant by *elegit*, and the retention of such tenancy existed until, by the profits of the land, or otherwise, the debt was satisfied, when this tenancy terminated, and the debtor became seised of the whole. This writ is not in extensive use in the United States. It is, perhaps, used in Florida, as against corporations, and in Delaware in special cases. The same has been repealed in Virginia a few years since.

The Extendi Facias or Extent.—This was a writ of execution by which the goods, lands, and person of the defendant may at once be seized.*

But the British creditors demanded a remedy more adequate and complete as against the American colonies, and the statute of 5 George II., ch. 7, was passed in the year 1732, which made lands chargeable with debts, and placed on the same footing with personal property.

In many of the States the early practice was to consider land as assets in the hands of executors and administrators to pay debts. Now, in most of the States, the executor or administrator can subject the lands to assets on application to the court, as directed by the statute for that purpose. In a proceeding of this kind, the personal property is treated as the primary fund, and the land can only be sold on it being made to appear to the court

* Freeman on Executions, § 6; 4 Kent, 429.

that the personal property has been exhausted in due course of administration. The heirs must be made parties to this proceeding. This is regulated by statute in the different States.

It is required by statute in most cases that the sheriff shall exhaust the personal property of the debtor before subjecting the land to be sold. This was the practice under the Roman law. Yet there is difficulty in reaching all manner of personal property by execution. A mere chose in action is not subject to execution, nor the mere right to personal property without possession and held adversely. But in the absence of any code regulation, when an execution at law was returned *nulla bona*, the court of chancery would render its assistance to reach all that class of property which could not be reached by execution.

The same end is now accomplished in many of the States under the modern code practice by a proceeding supplementary to the execution, which is a substitute for the bill in equity, and to some extent for a creditor's bill.

This failure of the sheriff to exhaust the personal property, however, will not affect the purchaser of the land at the sale; he is not bound to show that the debtor had not personal property sufficient to pay the debt in whole or in part. Neither will a mere irregularity in the proceedings on which the execution is founded vitiate the sale.*

Of course if the proceedings were null and void the sale would pass no title. Decrees in equity are now generally enforced against the property by the process of execution. Other safeguards have been thrown around the debtor's land, such as the requirement that the lands be appraised before sold, and the right to redeem the same in a certain time fixed by statute. These are matters regulated quite differently in the different States, in some of which, as in the State of North Carolina, no statute exists allowing the debtor to redeem the land. Tennessee allows the debtor to redeem within two years from the date of sale, and in New York one year is allowed, and, generally, where the debtor is allowed to redeem, the creditors not satisfied are allowed to redeem.

The statutes requiring the valuation and appraisement of the

* *Anderson v. Clark*, 2 Swan., 156; *Cunningham v. Cassidy*, 17 N. Y., 276.

land are void as to mortgages and contracts made before the act. They are in the nature of stop laws, stay laws, and exemption laws.*

Sheriff's Deed—Its Effect by Relation.—The sheriff or marshal who has an execution founded on a judgment and exposes the same to sale under the regulations established by law exercises a statutory power—a naked power. This sale by sheriff is unlike a sale made under a decree of a court of equity. In the latter case the court receives the bid as an offer of purchase, and exercises the power of accepting or rejecting the same, and the court continues to exercise an equitable supervision over the parties and subject-matter until all the rights involved are settled. The sheriff or marshal conveys the debtor's interest in the land, and can sue for the purchase-money in his own name.†

The Act of Congress 29th September, 1789, and acts subsequent, provide that the forms of execution shall be the same as those issuing from the State courts. The United States is not a foreign power in this regard, neither is it allowed as a matter of comity, but as a mode of subserving the ends of justice.

So the power of the marshal and his duties, and the legal results of their acts in this regard, are similar to those of the sheriff acting under authority of the State court.‡

It is true that all executions from the United States courts operate as a lien from the *teste*, while this rule is changed now in many of the States, where the judgment is made a lien upon the lands of the debtor from the date of docketing the same.

So that an execution issued from the State court on a judgment docketed prior to the *teste* of the *fi. fa.* from the United States court would constitute a prior lien, and consequently if the judgment in the State court was docketed subsequently to the *teste* of the execution issuing from the United States court, the latter would have the prior lien. At common law the execution did not constitute a lien until the statute of West. 2, 13 Edward I., giving the *elegit*. Now the statute of 1 and 2 Victoria,

* See the interesting opinion of Chief Justice Taney in *Bronson v. Kenzie*, 1 How. (U. S.), 311. The decisions of the State courts are many and to the same purport.

† *McKee v. Lineberger*, 69 N. C., 217.

‡ *U. S. Bank v. Halstead*, 10 Wheat., 51; *Coughland & Randall v. White*, 66 N. C., 102.

chap. 110, makes the *judgment* a lien, except as to purchasers without notice.

In England all judgments prior to statute 29 Charles II. related to the first day of the court and not to the term, but this rule is also changed in most of the States perhaps. In most of our courts the record is read each day, and the same is signed by the judge, and especially in a question of priority of lien the day on which the judgment is rendered can be shown, and in some instances the fractions of the day will be recognized. Thus in the case of *Murfree v. Carmack*, 4 Yerger (Tenn.), 270, a judgment was rendered against the debtor and a mortgage executed by the debtor on the same day. The court held that it was competent to show the precise period of the day when the judgment was rendered and when the mortgage was executed, in order to establish a priority of lien. The mortgage being regular in form and the party claiming under the same being in possession and being the defendant, his title would have prevailed, but for the fact appearing that the judgment was rendered *before* the mortgage was executed on the same day.

The effect of the statutory regulations by which the judgment is a lien upon lands from the date of enrolment or docketing would be to repeal the rule of relation to the first day of the term.

On this point Mr. Freeman, in his work on Executions, has collated all the authorities. He says, § 333: "While the title of the defendant is not, in a vast majority of the States, divested until the execution of a conveyance to the purchaser, this conveyance, when made, must, for some purposes, be given effect as though executed at some period antecedent to its date. The relation of deeds made in pursuance of sales under execution is very frequently spoken of in the reported cases; and yet about the only thing which we conceive to be well settled in regard to the doctrine of relation is that each deed must be given such an effect as will preserve and make effectual the lien under which the execution sale was made. A lien is sometimes created by attachment; sometimes by the docketing of a judgment; sometimes by the issue of execution, and sometimes by a levy. But, however created, it takes precedence over subsequent liens and transfers, and a sale and conveyance, based upon such lien, transfer to the

purchaser all the title which the defendant held when such original lien attached. To this extent, the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created. The decisions on this subject are consistent and numerous."*

Under this rule, if a lease be made after the lien created, the conveyance gives the purchaser the right to disregard the lease. So a sale under a lien subsequent to a lease gives the purchaser the right to the rents after he receives title.† The great result obtained by the execution in this regard is the enforcement and perfection of the *lien*; for if no steps be taken it would result, as a matter of course, that the lien would be lost, and rights subsequently attached take effect through the enforcement of the same by execution. This doctrine of relation has been carried to a curious extent in many instances. In New York and Missouri it was held that a party bringing an action of ejectment before a deed was obtained could do so, pending the action, which by relation would operate as proof of title when the suit was instituted;‡ but in California and North Carolina this doctrine is repudiated as carrying the doctrine of title by relation too far.§

The sheriff's deed cannot by relation enable the grantee to sustain an action of trespass for injuries done to the lands or improvements after the day of sale; because this action lies only for injuries done to the possession, yet the purchaser could sustain an action in the nature of waste.||

* Feley v. Barr, 66 Penn. St., 196; Bank of Missouri v. Wills, 12 Mo., 361; Shirk v. Wilson, 13 Ind., 129; Cockey v. Milne, 16 Md., 200; Lackey v. Seibert, 23 Mo., 85; Reichart v. McClure, 23 Ill., 516; McClure v. Englehart, 17 Ill., 47; McCormick v. McMurtrie, 4 Watts, 192; Kane v. Mackin, 9 S. & M., 387; Kingman v. Glover, 3 Rich., 27; Miles v. Wilson, 3 Harring, 383; Miller v. Riley, 1 Dana, 359; Jackson v. Dickerson, 15 Johns., 309; Smith v. Allen, 1 Blackf., 22; Hutchings v. Ebeler, 46 Cal., 557; Clement v. Garland, 53 Me., 427; Haywood v. Hildreth, 9 Mass., 393; Hall v. Hoxie, 3 Met., 251; Strain v. Murphey, 49 Mo., 337; Howard v. Daniels, 2 N. H., 137; Hoke v. Henderson, 3 Dev., 12; Boyd v. Longworth, 11 Ohio, 235; Wood v. Turner, 7 Hump., 517; Testerman v. Poe, 2 Dev. & Bat., 103; Parker v. Swan, 1 Hump., 80; Eller v. Ray, 2 Hawks., 568.

† Martin v. Martin, 7 Md., 368.

‡ Jackson v. Ramsey, 3 Cow. (N. Y.), 75; Crowley v. Wallace, 12 Mo., 143.

§ Bagley v. Ward, 37 Cal., 121; Davis v. Evans, 5 Ire. (N. C.), 525; Richardson v. Thornton, 7 Jones, 458.

|| Freeman on Executions, § 333.

It might be observed that the prime object and reason of this title by relation in a sheriff's deed is to protect the grantee against a subsequent lien, and therefore involves the issue between a senior and a junior incumbrancer; but in an issue between the grantee and the debtor or those claiming under him this doctrine is not carried to so great an extent; at least the courts have differed on this point, as has been seen. In regard to the question of mesne profits on a recovery in ejectment by the grantee against the party in possession, he is not entitled to recover for mesne profits accruing before the execution of the deed. The proceeding by which the judgment debtor is divested of his property is a statutory one, and until that proceeding has been *completed*, so as to vest the title, and with it the right to the possession in another, he may lawfully remain in possession without being accountable for use and occupation. So if the debtor has the right of redemption, at the expiration of the time for redemption the purchaser or person holding his title has a right to have the sale *completed* by the execution of a deed, and until this is done he cannot recover the possession, and not having been entitled to the possession, could not recover for use and occupation;* though if the grantee had obtained possession before expiration of time of redemption, the deed by relation would protect him from a prosecution as a trespasser.

It has been held, also, that if a sale be made under a decree foreclosing a mortgage, the deed takes effect by relation, and transfers all fixtures placed on the premises after the execution of the mortgage and remaining thereon at the day of sale; but does not confer upon the purchaser the right to recover fixtures removed before the sale.†

In many of the States, as in North Carolina, provision is made for the docketing of a judgment rendered by a justice of the peace in the office of a superior court of record.

The provision of the code in that State, § 503, provided as follows:

"A justice of the peace, on the demand of a party in whose favor he has rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the Superior

* Whipple v. Farrar, 3 Mich., 447; Kingman v. Glover, 3 Rich. (S. C.), 27.

† Sands v. Pleiffer, 10 Cal., 253.

Court clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk shall be noted thereon, and entered in the docket, and from that time the judgment shall be a judgment of the Superior Court in all respects. The execution thereon shall be issued by the clerk of the Superior Court to the sheriff of the county, and shall have the same effect, and be executed in the same manner as other executions of the Superior Court. A certified transcript of such judgment may be filed and docketed in the Superior Court clerk's office of any other county, and with the like effect in every respect as in the county where the judgment was rendered, except that it shall be a lien only from the time of filing and docketing such transcript. But no justice's judgment for a less sum than twenty-five dollars, exclusive of costs, shall be so filed and docketed in the office of the clerk of the Superior Court."

As a general rule the sheriff's deed passes the title of the debtor from the date of sale, although the deed may bear date long afterwards, and the fact that the sheriff's deed being made after the sale was dated back to the date of the sale, does not affect the validity of the deed.*

So that the relation protects the statute of limitations of seven years, a sheriff's deed being color of title, although the sheriff's return of sale simply is not color of title. This is like bargain and sale of land under the English statute of enrolment; it relates to the date of the deed, although of no efficiency until enrolled.† In most of the New England States, however, the sheriff's official return of the proceedings under the execution constitutes the title of the creditor, as does the sheriff's return of the inquisition upon the *elegit* in England, and no deed is executed, for the title rests upon matter of record.‡

But it might be said that for most purposes the sheriff's deed has *relation* to the date of the judgment, and certainly as to subsequent purchasers and incumbrancers. In some of the Eastern States the judgment is not a lien upon the lands of the debtor, but, as a security for the creditor, provision is made for an attach-

* *Dobson v. Murphey*, 1 Dev. & Bat. Law, 586; *Davidson v. Frew*, 3 Dev., 3.

† *Dobson v. Murphey*, *supra*, 7 Hump. (Tenn.), 577; *Peck*, 30.

‡ 4 Kent's Com., 434.

ment, in the first instance, upon the land, which operates as a lien.

This lien of the judgment is not a *title* to the land; it only gives the party having the *prior* lien the right to perfect the lien into a title by following the course of the law in *preference* to a junior lien of the same or different character. This lien is neither *jus in re*, nor *jus ad rem*; the judgment creditor gets no estate in the land, and a release of his right to the land would not prevent him afterward from taking the same in execution.* It will result from this reasoning that where there are two judgment creditors, each having a docketed judgment, and a sale by the sheriff on the junior docketed judgment passes the title to the purchaser, subject to the senior docketed judgment; the junior judgment takes the position of a second mortgage, and can only get title by payment of the sum secured by the prior lien.†

By the English common-law rule the lien of the judgment binds after-acquired lands, and so it is under most of our statutes making the judgment a lien on lands. The effect of a sheriff's deed by *relation* has its analogy in cases of a deed by commissioner or clerk or master in equity, which *relates* to the *decree* of sale, and the case of a bargainor, who makes a title-bond and subsequently executes a deed, the same relates back to the date of the title-bond.‡ This *relation* affects all purchasers and incumbancers who have notice, and the *lis pendens* in one case is sufficient, and the registration or *actual* notice of the title-bond in the other is sufficient.

The judgments of the Federal courts are a lien on lands in New York, Pennsylvania, Maryland, and probably in some other States in like manner as judgments of the State courts.§

This idea of making the judgment a lien upon the debtor's lands, now so prevalent in the United States, had its origin from the English statute of 4 and 5 W. and M., ch. 20. And this statute has been enlarged by the statute of 1 and 2 Vict., ch. 110, which requires a memorandum of the judgment to be entered in

* 4 Kent, 437, and notes.

† Halyburton v. Greenlee & Flemming, 72 N. C., 316; Freeman on Judgments, § 337.

‡ Thurman v. Anderson, 30 Barb., 624.

§ 4 Kent, 437, note c.

a book, arranged in alphabetical order, and a fresh memorandum to be made after five years from the first entry.

It has been held that a debtor after *verdict* and *before* judgment may lawfully give a preference to a creditor by conveying real estate to him in satisfaction of a *bona fide* debt, and thus prevent the lien of the judgment, provided the purchase was without fraud.*

Sheriff's Deed—Effect as to Title.—The sheriff acting under a naked power conveys the interest of the debtor and no more. If the defendant in the execution has the legal title, which is charged with an equity in behalf of a third party, the purchaser takes the title subject to the equity.† This power of the sheriff exists until the return-day of the execution, after which the power must be renewed to justify action.‡

Caveat emptor applies to titles in execution sales, and the purchaser is without remedy for a defective title.§

But if the judgment is wholly void, then the man who pays the purchase-money can recover of the creditor, whether the whole amount was paid him by the sheriff or not. This is the doctrine of the case of *Henderson v. Overton*, *supra*. It is upon the principle that the money is obtained from the purchaser by the creditor under a kind of fraudulent pretence, the judgment being held out as valid as an inducement to obtain money from him who may be inclined to purchase.

But a contrary view might be taken of this decision. As a general rule a man who deals with a record is presumed to know the legal effect of the same, and in case of agent or appointee, if a total want of authority appears from the record, the party dealing is supposed to know it. So a judgment is a public record, and the party who parts with his money on the faith of this record should be required to know if the same is void under the law of the land, as, for instance, that the court had no jurisdiction of the subject-matter. Of course if the judgment was the result of the fraud of the creditor, which could not be discovered by the outside world except on an issue made in reference thereto, there is a cogent reason why the creditor receiving the money

* *Waterbury v. Sturtevant*, 18 Wendell, 353.

† *Walker v. Woody*, 65 N. C., 579; *Henry v. Rollins*, 78 N. C., 342.

‡ 1 Swan., 142.

§ *Henderson v. Overton*, 2 Yerger, 396.

should be liable to repay the same to the party who had parted with his means through the fraud of such creditor.

There are instances, however, in which a court of equity will substitute the purchaser at execution sale to the rights and remedies of the creditor.

Action to Remove a Cloud.—The purchaser at execution sale has been allowed to file a bill in equity to set aside a deed made fraudulently by the debtor before the execution sale. And this was allowed, although the defendant is in possession, and the complainant having the legal title, might sue at law for the recovery of the property, that not being esteemed adequate relief.* In a case of this kind the complainant sues as *owner*, yet he is vested with the rights of the creditor.†

In the case of *Busbee v. Lewis*, 85 N. C., 332, Judge Ruffin intimates that no case can be found where a court of equity has ever entertained a bill to remove a cloud from the title of a person who was himself out of possession, or in a condition to test the superiority of title in a court of law. This is certainly the general rule; but there is another rule equally recognized that, where the remedy is not adequate in a court of law, equity will interfere to assert the right claimed. Then, again, a court of equity always affords the most adequate and complete remedy where the right is beclouded or circumvented by fraud. In the case cited from California the purchaser, at execution sale, was out of possession, and might have brought ejectment, but the decision is placed upon the ground that the action at law afforded in this case an *inadequate* remedy. The debtor had, previously to the sale by sheriff, made a fraudulent conveyance, with intent to hinder and delay creditors, and it would seem that no objection could exist to the interference of a court of equity, although the party claiming the right was *out of possession*.

And in regard to the party in possession who files a bill to remove a cloud from title it might be said, if he is in possession,

* *Hager v. Shindler*, 29 Cal., 47; *Almony v. Hicks*, 3 Head. (Tenn.), 39; 2 Yerger, 524; 10 Yerger, 59, 83.

† 14 John., 497.

As to the right to remove a cloud see 2 Story Eq., secs. 699, 700; *Sands v. Hildreth*, 14 John., 497; *Ridgeway v. Underwood*, 4 Wash., 129; *Hilreath v. Lands*, 2 John., ch. 49.

why not wait until he is sued at law, and then show the superiority of the legal title? But, then, a court of equity, acting upon the idea of a bill *quia timet*, will consider the fact that the action may be delayed until the evidence is lost, and also the fact that a cloud hangs in the distance which *threatens* the title of the party in possession, and will therefore interfere to remove the same, and thereby quiet the title of the possessor.

If the party who files a bill to remove a cloud shows that the deed or paper-title constituting the cloud is void upon its face, equity will not interfere. In the case of *Busbee v. Lewis*, *supra*, the plaintiff alleged that the deed sought to be set aside was void upon *its face*, for want of a sufficient description of the premises, and the court refused to interfere for that reason. Why invoke the aid of a court to declare void and ineffectual, a paper that upon its very face is void for all purposes, and therefore a nullity?

But in those States where the English statute of 13 Eliz., chap. v., has been enacted, it would seem that the creditor or purchaser who holds under a sheriff's sale need not go into a court of equity, because this statute declares a conveyance made with intent to avoid a debt is *void*, and therefore a nullity in any *forum*; and consequently the evidence to show the fraud may be adduced in a court of law. So that it is competent to bring an action of ejectment or an action to recover land upon a title founded on a sheriff's deed, and show on the trial that the title held by the defendant in possession is void for fraud under this statute. This, too, on a simple declaration or complaint alleging title in the plaintiff, and unlawful possession in the defendant, without alleging the fraudulent procurement of the title.

On the trial, the plaintiff shows his title founded upon the record and sheriff's sale, and closes the case in chief. The defendant then produces *his* title, and asks to be let alone in the possession. And in *rebuttal* the plaintiff shows to the jury the *fraud*, and, if so decided by the jury, the court gives judgment for the plaintiff.

I think, however, under the code procedure now so generally adopted, the better practice would be for the plaintiff to be required in all cases, where fraud in the procurement of title is the issue, to allege in the complaint the facts constituting the fraud.

This is more consistent with the general idea prevalent in pleading that the defendant should have notice of what he is called upon to answer. While the statute against fraudulent conveyances makes the deed void, the operation of the statute cannot be realized until the fraud appears under the forms of a judicial investigation. Hence a statute might be well, requiring fraud to be charged specifically in the complaint, if that is the point in controversy. And it is of every-day occurrence that the party sued, or one or more of the parties defendant claim as purchasers from the fraudulent vendee. Then if it appears that he is a purchaser, with notice of the fraud, equity holds him as trustee; but the complaint ought to allege this knowledge, and thereby make the issue direct. Then, again, it may often happen that the alleged fraudulent vendee relies upon the defence that *he* is a *bona fide* purchaser, without notice; if so he is protected, although the bargainor might have had a fraudulent intent, for fraud is the result of the contract of two or more; and the fraudulent purpose of one of the contracting parties does not bind the other party.*

This requirement in pleading would result in more certainty and accuracy in the issues to be submitted to the jury. The court would confine the parties to the direct issues tendered by the parties in the written pleadings, and the loose practice of allowing an issue to be submitted to the jury on the mere request of the attorney, without foundation being laid in the pleadings, should be discountenanced.

What Necessary to Support the Deed.—The judgment and execution being the authority for the sheriff to pass the title of the debtor, these must be shown. It is not sufficient that the recitals in the sheriff's deed show a judgment and execution. In the case of *Edwards v. Tipton*, 77 N. C., 222, Judge Rodman, *arguendo*, said that the recitals in the sheriff's deed, of judgment, execution, levy, and sale, were not, in any case, held as *prima facie* evidence of their existence; but this was modified in a subsequent case in the same court on an investigation of the authorities in other States. The result of the weight of authority is that the recitals of the levy and sale may be taken as *prima facie* evidence of the same,

* *Lassiter v. Davis*, 64 N. C., 498.

as they are the official acts of the sheriff, but as to the judgment and execution they must be shown by the record, and proof outside of the recitals in the sheriff's deed.*

The purchaser at the sale, before getting a deed, has a mere equity, which he may assign to another party, to whom the sheriff may make the deed. The recital of the fact in the sheriff's deed would be *prima facie* evidence of the fact. In England, a vendee under the sheriff's sale, if a *stranger* to the judgment, need not on the trial show a judgment, but only an execution.†

But, under the English rule, if the purchaser at execution sale was the *plaintiff in the judgment*, he was required to show the judgment.‡ I apprehend, however, that in most of the United States, the purchaser or claimant under a sheriff's deed is bound to show a judgment whether he be a *stranger* or *party* to the judgment.§ In North Carolina, in consequence of the Act of 1848, the English rule is the law of that State.||

Other requirements of the sheriff are found in the law, such as time and place of sale, notice to the defendant in the execution, the exhaustion of the personal property before levy on the land, etc., but, generally, the failure to observe these requirements will not render the deed void in the hands of an innocent purchaser. Some of the States, however, make the sale *void* if the defendant does not have *notice* of the time and place of sale. If the deed recites that the land was duly advertised and sold according to law, this is *prima facie* evidence of the fact that notice was given; but, if proof to the contrary, then not.¶

Mere irregularities will not render the deed void, as, for instance, a want of notice where the sale and purchase are in good faith.**

* Freeman on Executions, § 329; Kelley v. Green, 53 Penn., 302; Sabbattie v. Boggs, 55 Ga., 572; Taylor v. Elliott, 52 Ind., 588; Anderson v. Clark, 2 Swan, 156.

† Doe ex dem. Balten v. Muirless, Sel., 110. ‡ 3 Eng. Com. Law R., 312.

§ Dobson v. Murphey, 1 Dev. & B. Law (N. C.), 586; 3 Dev., 3; 4 Kent 436 (note c).

|| Rutherford v. Rabun, 10 Ire., 144; Hardin v. Clark, 4 Jones, 135.

¶ 10 Hump. (Tenn.), 234.

** Woody v. Gilliam, 67 N. C., 237; Trotter v. Nelson, 1 Swan (Tenn.), 7; Woodcock v. Bennett, 1 Cow. (N. Y.), 737; Jackson v. Robbins, 16 John. (N. Y.), 537; 4 Smedes & Marsh, 602.

Under the practice in regard to execution liens, before the statutes making the judgment a lien on real property, a sale under a junior judgment passed the title to the purchaser, and the proceeds of the sale were adjusted by the court on motion, where there was a claim in favor of an execution of a prior *teste*, but this controversy had nothing to do with the title of the purchaser.*

To allow title at execution sale to fail on account of every irregularity or failure of the sheriff to observe directory statutes, would destroy all confidence in this mode of acquiring title, and no one would be inclined to pay a fair value for the lands of the debtor.

It has been held that the purchaser at execution sale is not affected, though the execution be subsequently quashed.† And in New York, it has been held that even if the judgment had been paid, and no satisfaction appeared of record, and the purchaser was without notice, the title of the purchaser at execution sale would be valid.‡

Upon the reversal of a judgment, after a sale has been made under execution to a stranger to the suit, the defendant must seek redress from the plaintiff, for the purchaser obtains the title, and the defendant cannot, therefore, be restored to the possession of the property.§

If the plaintiff has received the proceeds of the sale, the defendant can recover in an action for money had and received. If, however, the money had been paid to the plaintiff and by him paid to a third person, it cannot be recovered from such third person.||

A question has arisen as to whether the plaintiff must account to the defendant for the value of the property sold, or for the sum of money it brought at the sale. "In California," says Mr. Freeman, "it has been held that an action may be sustained to recover damages suffered from the sale, but, in other States the plaintiff may exonerate himself by paying the amount for which the property sold, with interest from the date of sale."¶

* Freeman on Executions, § 196.

† Doe v. Snyder, 3 How. (Miss.), 66.

‡ Jackson v. Caldwell, 1 Cowan, 622.

§ Freeman, Ex., § 346.

|| Langley v. Warner, 3 N. Y., 327.

¶ Authorities cited, § 347.

It would seem that in many cases the mere recovery of the money and interest would be inadequate compensation for what might be called the *wrong* of the plaintiff in obtaining such proceedings as would result in passing the title of the defendant's property to a third person, the proceedings being *unwarranted in law as shown by the reversal*.

Then, again, the property may have sold for a sum greatly below its real value. The rule established in California* better subserves the principles of the law of compensation for damages which are the direct result of the *wrongful act of another*. The rule is different when the party in whose favor the judgment is rendered, or his assignee, is the purchaser of the defendant's property; on a reversal of the judgment the defendant is entitled to restitution of the property, if within the control of the plaintiff or his assignee. The owner of the judgment, or the assignee of the same, takes the property at the sale subject to the risk of losing the same on a reversal of the judgment. If the plaintiff or assignee transfers the property to a third party in good faith, and for a valuable consideration, the latter takes it free from the contingency of a reversal.†

The plaintiff's attorney is bound in law to know the defects of his client's proceedings, and if he becomes the purchaser he is in no better condition than the plaintiff in the judgment, and is liable to restitution or damage perhaps if the judgment is reversed. It sometimes happens that others are interested in the judgment, as in the case of lien-holders made party defendants and entitled to a portion of the proceeds if the property is sold for more than sufficient to pay the prior liens; such a lien-holder may purchase and hold notwithstanding a reversal of the judgment, if the proceeds of the sale were distributed among other lien-holders.‡ If, however, such lien-holder received the chief benefit of the result of the sale he is not protected as in the case of a stranger on a reversal, and must make restitution.

In the case of *Gossam v. Donaldson*, 18 B. Monr., 320, and other cases in Kentucky, it is held that even the party to the

* *Reynolds v. Hosmer*, 45 Cal., 616.

† *Freeman*, § 347; *Guiteau v. Wiseley*, 47 Ill., 433; *McAusland v. Pundt*, 1 Neb., 211.

‡ *McBride v. Longworth*, 14 Ohio St., 349.

judgment, who purchased at the sale, held the property notwithstanding a reversal. But the Supreme Court of the United States (opinion by Justice Field), in *Galpin v. Page*, 18 Wallace, 350, recognized the weight of authority as different from the holdings in Kentucky. The case originated in the State of California, in which State the doctrine they say was well established that the plaintiff, being the purchaser at execution sale, could not hold the property if the judgment was *reversed*, and the opinion leaves the question, rather reluctantly, as fixed by the decisions in California, reciting a similar holding in other States.

Judge Field remarked that he had held differently in a case in the Circuit Court, but with facts quite different, the opinions were reconcilable perhaps.

Of the Levy on Lands.—As a general rule the sheriff cannot sell lands without a levy, which is a specific assertion by the sheriff on the execution of his legal authority to sell it.* But in the case of *Wood v. Colvin*, 5 Hill (N. Y.), 228, it was held that as judgments were made liens upon lands no formal *levy* or seizure was necessary; that the receipt of the execution to sell amounts to a levy, and anything more formal would be an idle ceremony. It is not easy to conceive how the purchaser would know what lands he bought in the absence of some specific designation in writing. The judgment is a lien upon *all* the lands in the county, and perhaps a sale described as all the lands in the county owned at and subsequent to the docketing of a certain judgment might do. But suppose the debtor has several tracts of great value and the judgment is comparatively small, requiring only a small portion of the land, how will the sheriff designate what lands, where situate, etc.? How will the purchaser know what lands are offered for sale? The specific levy of the sheriff and a sale and deed by him for the same land so levied upon is the only mode of obviating these objections.

To render the proceedings under execution sales complete, four things are necessary:

1. A judgment against the debtor.
2. Execution and levy on the real estate.
3. A sale by sheriff or other officer.

* 3 Hill, S. C., 292; *Waters v. Duvall*, 11 Gill. & Johns., 37.

4. A deed of conveyance by the officer to the purchaser or his assignee.

The levy must be such: First, that the purchaser has the means of knowing what land is to be sold, so as to form some estimate of its value; second, as shall prevent one piece of land being sold and a different piece conveyed.* The description in a levy of "all the unsold lands in a forty-thousand acre tract" is entirely vague and void for uncertainty.†

"It is sufficient if the levy so describes the land as to distinguish it from all other lands."‡ Locality is a question for the jury, therefore in ejectment, where it is doubtful, parol evidence showing this was the only land held in the county by the debtor was competent.§

If a remainder interest it must be specified, and it is not sufficient to describe the land.||

In short, the sheriff should describe the land which he proposes to sell under the power of the execution with that reasonable certainty required in contracts in reference to land. Then, like other descriptions, if necessary, it may be aided by parol in case of latent ambiguity. This levy should be entered on the execution and returned as a part of the record, and when the parcel or tract so levied upon is sold, the deed should not attempt to convey any land not so levied upon and sold. If the sheriff's deed conveys more land than covered by the levy it is void *pro tanto*.

The levy can be read to contradict the deed, and thereby show what land was actually sold.¶

The Sheriff's Deed does not Authorize the Purchaser to take Possession in a Summary Way, but must bring an Action.—The deed is only a muniment of title; it may be only one of the links of the chain. The sheriff makes no warranty of title; he sells what he supposes or may be advised to be the land owned by the debtor, and in this he may be mistaken; the debtor may have no title at all; the title may be in a third person, or the interest owned may be one not subject to execution; all this the purchaser has to risk under the doctrine of *caveat emptor*. If the debtor refuses to give possession, or those claiming under him or

* 3 Sneed (Tenn.), 221.

† 3 Hump., 629.

‡ 3 Yerger, 171.

§ 7 Yerger, 490.

|| 2 Heiskell, 4.

¶ Jackson v. Jackson, 13 Ia., 159; Edwards v. Tipton, 77 N. C., 222.

in their own right refuse to recognize the sheriff's title, the holder of the same is driven to his action to recover the possession, in which action the title is settled.* The doctrine of champerty does not apply to execution and judicial sales, therefore the debtor's interest may pass by the sheriff's deed although sold when the debtor was out of possession and when adversely held.

If the debtor is the defendant in the ejectment suit, on proof by the plaintiff that he (the defendant) was in possession at the time of levy and sale, he need not deraign title further back than the sheriff's deed. The defendant being (the debtor) in possession raises the presumption of title in him; but this presumption may be rebutted by the debtor showing he had no title subject to execution, or that the proceedings were null and void.†

In New York it has been held that the debtor who holds over after the sale of his land is a quasi-tenant of the purchaser, and cannot deny he had title.‡

But the Supreme Court of Tennessee, in the case of *Kimbrough v. Burton*, *supra*, in referring to this case in New York say that the reason is because the statute in that State makes equitable estates liable to execution, and suggested the danger of adopting this construction without adopting the statutes. They said if this was so, the debtor's interest under a title-bond would pass, the quasi-tenancy being sufficient to estop the debtor from the denial of title.

If the debtor was in possession of the land sold, he must make a surrender of the same to the purchaser, and he cannot avoid this obligation by showing that his title was invalid, and that a third person is the true owner.§

All persons who come in under the defendant in the execution after the lien of the judgment or levy, are bound by the same estoppel.|| If the debtor continues in possession after the sale, he

* *Freeman, Ex.*, 350. If the defendant in the execution was in possession of the land he cannot defeat a recovery by showing an outstanding title. *Leach v. Jones*, 86 N. C. Reports.

† *Kimrough v. Burton*, 3 Hump., 129; *Freeman, Executions*, § 351.

‡ 4 Johns., 232.

§ *Boyd v. Jones*, 49 Mo., 202; *Wade v. Sanders*, 70 N. C., 277; *Dunlap v. Cook*, 18 Penn. St., 454; *Freeman, Ex.*, § 351.

|| *Carson v. Smart*, 12 Ire., 369.

is regarded by some of the authorities as a tenant at will of the purchaser.* In California it has been held that the defendant may retain possession upon showing that he was a mere occupant of the public lands, and that since the sale he has acquired a homestead or other right under the United States.† This is in view of the power of the General Government over the public domain.

If the grantee under the sheriff's deed brings the suit against a party other than the defendant in the judgment, or those coming in under him subsequent to the lien, he must deraign his title as in all other cases in which there exists no estoppel. It was held by several of the cases, and sustained by Mr. Greenleaf in his work on *Evidence*,‡ that, in a suit against the defendant in the judgment, the plaintiff need not produce the judgment for the reason of the presumption of a judgment arising from the acquiescence of the debtor in the execution; but the authority is quite well settled the other way at this time.§

What the Purchaser gets at the Sale.—He may obtain nothing in the case: 1. When the proceedings are null and void, as if the court had no jurisdiction, or so defective that the title of the defendant is not divested. 2. When the defendant had no title which could pass by execution. In these instances the purchaser has parted with his money, for which he gets nothing, under the doctrine of *caveat emptor*.|| It is true that where the plaintiff is the purchaser, he may have the satisfaction produced by the sale set aside by the court, and a new execution may issue.

The purchaser gets what the debtor has, and no more.¶ The statutes in most of the States make an equitable estate subject to execution sale.

* *Colvin v. Baker*, 2 Barb., 206; *Webb v. Thompson*, 23 Ind., 428; *Swift v. Agness*, 33 Wis., 228.

† *Emerson v. Sansome*, 41 Cal., 552; *Montgomery v. Whiting*, 40 Cal., 294.

‡ 2 *Greenleaf, Ev.*, § 316.

§ *Freeman, Executions*, § 351, and authorities cited.

|| Where there has been a previous levy and sale, a subsequent execution confers no authority to sell the same land; it is confined to other property of the defendant, and this the defendant may show in an action by the purchaser at sheriff's sale. But the rule does not apply to executions on *different* judgments, *Peebles v. Pate*, 86 N. C. Reports.

¶ *Roer on Judicial Sales*, §§ 968, 969.

The 4th section of the North Carolina Act of 1812 provided that when A. holds lands in trust of B., the interest of B. may be sold under execution, and the purchaser of such will draw to it the legal estate of A. ; so the purchaser got the whole title, equitable and legal. The result was the same as if A. had passed the legal title to B., and then had been sold.*

"It follows," says the judge, "that if B.'s equity was such that he had no right to call for the legal title, as if A. held the legal title to perform some trust, then B.'s equity could not be sold, because the sale of B.'s equity would not draw to it the legal title out of A., which B. had no right to. In other words, a simple trust could be sold, but a mixed trust could not."

This same act made the equity of redemption subject to execution, and the same principle applies: A. mortgages his land to secure \$1000: he has a clear right to pay the \$1000, and call for the legal title; if sold by execution, the purchaser can do the same thing. In the case of A., who sells his land, executes a title-bond to B., the purchase-money partly paid, neither has an interest subject to execution, because it is a mixed trust. A. holds the legal title in trust for himself to secure the purchase-money, and then for the benefit of B., when he shall have paid the purchase-money.

So in a trust-deed for the benefit of creditors, nothing can be sold under execution.†

If B. had fully paid the purchase-money and was in possession, then his equity would pass by the execution, because B. could call on A. for the legal title, he not holding it charged with any other trust;‡ so the purchaser at execution sale could do the same thing. So in most, if not all of the States, provision is made by statute for the sale of the equity of redemption by execution sale. In Tennessee an *entry* is the subject of execution, and it would result, that if after the sale the debtor should obtain the grant he would hold it as trustee for the purchaser of the *entry*.

The statute of 1 and 2 Victoria, ch. 110, §§ 11-13, makes a docketed judgment a charge upon the equitable as well as the legal estate of the debtor in lands, except as to purchasers for

* Judge Reid in *Tally v. Reed*, 72 N. C., 336.

† *Moore v. Byers*, 65 N. C., 240; *Sprinkle v. Martin*, 66 N. C., 55.

‡ *Morgan v. Bouse*, 53 Mo., 219; *Roer on Judicial Sales*, § 666.

valuable consideration without notice. This sale of an equity is the result of local legislation, and the decisions are not in full harmony on this point, but in nearly all the States a clear and unmixed trust is the subject of execution.*

Lands may be sold under execution, although in the adverse possession of a third party at the time, if the debtor still retains the right of entry. It is true that a mere "claim of title without merit and without possession is not subject to execution, and a sale against such claimant transfers no interest and creates no estoppel. If he should chance afterwards to take possession, he cannot be ejected under the sheriff's deed."†

Purchaser at Execution Sale.—It is universally said in the books that *caveat emptor* applies in full vigor in execution sales, and yet this proposition is not absolutely true. It is said very frequently, too, that *caveat emptor* applies to all judicial sales, which is not accurate, as we shall see further along in the progress of this work. A sale at execution is not a judicial sale. The distinction is well-defined, as will appear.

What then is meant by *caveat emptor*, as regards sheriff's sale? It means *take care, purchaser*.

In this sense why is it not applicable to all purchases, either private or at sheriff's sale? In neither case can the purchaser get what the party of whom he purchases does not own at the time or subsequently acquire. The debtor has no more power to convey what he has *not* than the sheriff has when he makes a deed founded on execution sale.

But in the case of private sale the vendee can take a warranty of title and covenants of differ kinds, which gives the vendee a right of action for damages on failure of title, or in case of breach of other covenants. Still, he only gets the title of the vendor, and no more; if the vendor has no title, or it is incumbered, the vendee gets no title, or takes subject to the incumbrance. In the case of sheriff's sale there is no warranty of title or other covenants, and this is the difference.

Then all that the *caveat emptor* means, as applied to sheriff's sale, is, that if the *legal title* fails the vendee has no remedy for

* Freeman, Ex., §§ 117, 118.

† Ib., § 174, and authorities cited.

damages, except, perhaps, in the cases of a void judgment and fraud.

For in some other regards the vendee at private and sheriff's sale have like rights. For instance, a *bona fide* purchaser for valuable consideration is often protected against an outstanding equity of which he has no notice; and a purchaser at execution sale, especially a stranger to the judgment, is protected against a secret conveyance or equity against the debtor, of which he has no notice. Mr. Freeman says: "The purchaser at an execution sale takes his title subject to such liens, equities, and easements as it was subject to in the hands of the defendant in the execution, unless he can show that he is a purchaser in good faith, and without any notice, actual or constructive, of the existence of such lien, equity, or easement."* In the note quite a number of authorities are noted to sustain the position.† Under the registration laws and the general doctrine of constructive notice, the purchaser at execution sale obtains a valid title against an unregistered deed or other instrument required to be registered.¶ In this regard he stands like a purchaser at a private or voluntary sale, protected from claims previously acquired by third persons from the judgment-debtor of which he has no notice. If the party claiming the prior equity or superior title is in possession under the instrument this of itself is notice to the purchaser of the right claimed.

The lien of the judgment is subordinate to all rights, whether legal or equitable, capable of enforcement against the judgment-debtor when the lien attached. But if, before this lien is enforced, this judgment lien is ripened into a sale, the purchaser gets the property discharged of prior liens of which he had no notice. This is upon the principle that, in a contest between equities, his is best who first obtains the legal title. This protection to the purchaser, on account of the consideration paid and absence of notice, enables the purchaser to get what the judgment-debtor did *not* have; for as to the debtor the lien was valid, and bound the debtor thereby; but the purchaser gets the property

* Freeman, Ex., § 336.

† A different doctrine is held in North Carolina, where it is held that the purchaser at execution sale takes subject to the equity, whether he had notice or not. *Hicks v. Skinner*, 71 N. C., 539; *Rollins v. Henry*, 78 N. C., 101.

in this case discharged of the lien. It is true, in an abstract sense, that an execution (not being subject to the rule of market overt) against A. cannot pass the title to the property of B.; but, in a qualified sense, this is not so. A. makes a fraudulent conveyance to B., or makes a deed which is not registered; the deed in either case is binding on the parties and effectual if the vendee obtains the possession, or the land may be charged with an equity easily to be enforced in favor of B.; yet a creditor obtains a judgment, and execution and sale follow; a stranger purchases in good faith without notice; *he* gets a title—and estate *not* held by the debtor.

It is true, however, in the case of the deed being fraudulent as to creditors, the title, in strict law, has never passed out of the debtor; but this is only so as to creditors; as to the *parties* the deed is valid, both being *in pari delicto*, the wrong cannot benefit the parties.

Can the Creditor be an Innocent Purchaser?—In the State of Iowa several cases have established this rule: “When a creditor merges his judgment into a title, without actual or constructive notice of prior equities, he becomes a purchaser, and is entitled to protection, in the absence of equitable circumstances, with any other subsequent *bona fide* purchaser.”*

Says the same author, after collecting a large number of cases: “But, probably, a slight preponderance of the authorities dissent from the conclusions reached in Iowa, and maintain that, ‘to constitute a person a *bona fide* purchaser, within the meaning of the statute, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration;’ and that, ‘if he was a creditor antecedent to his purchase, and paid for the purchase by a credit on his demand, then, inasmuch as he has parted with no consideration on the faith of the purchase, he is not a *bona fide* purchaser within the meaning of the statute.’” It has been said that the case of *Wood v. Chapin*, 13 N.Y., 509, overrules the previous cases on the subject, and that the rule under that case is the same as in Iowa.

There is a difference between *lien* and an *interest*. “Superior liens may be discharged by a sale; but superior *interest* cannot be thus removed. The purchaser may succeed to the defendant’s

* *Halloway v. Platner*, 20 Iowa, 121; *Freeman, Ex.*, § 336.

title freed from the liens to which it was subject in the defendant's hands. He cannot, however, succeed to a title or interest not held by the defendant."

A widow's right of dower is an interest in the land, not a mere lien.*

In the States where the docketed judgment becomes a lien, the sale under a junior docketed judgment does not displace the lien of the senior docketed judgment, which may be enforced if the purchaser refuses to pay off the senior incumbrance. The purchaser under the junior judgment gets only an equity of redemption. But, under the old rule, where the execution constituted the lien, the purchaser under a junior execution got title to the property, and the sheriff or court applied the proceeds to the lienholders.

In reference to purchasers at execution sale, Mr. Roer, in his work on *Judicial Sales*, § 1031, says: "It is held, by many authorities, that where the plaintiff in execution becomes the purchaser, he will not be protected against an unrecorded deed from the debtor for the same land, older than his lien, as for want of notice of such deed, as he has parted with no money, but merely receipted the writ. Whereas, as is alleged, to place himself in the position of a *bona fide* purchaser, he must actually have made payment. But even the ground of this reasoning is untrue in part, for he must, at all events, pay money in discharge of costs and charges of sale." He further says: "Though there is a conflict in the rulings on this subject, more especially in reference to registry acts in some of the States, yet the weight of authority is that third persons, *bona fide* purchasers at sheriff's sale, who have paid the purchase-money, without notice of an unrecorded deed or equity, will be protected against the same. Of late, decisions have gone far toward extending the same rule to purchases by execution plaintiffs."

If the deed or mortgage be registered before the sale, or the purchaser has notice before he pays his money, he will not be protected.

Although there is no warranty ordinarily in an execution sale, yet the officer selling is bound to act with fairness, and, if he imposes upon the purchaser by holding out and representing the

* Freeman, Ex., § 338.

title in the debtor, when he knew it was not, he will be liable to an action at the suit of the purchaser for the purchase-money, if paid while yet in his hands.*

The Reciprocal Obligations between Sheriff and Purchaser.—

When the sheriff sells land in the mode prescribed by law, and the purchaser pays or tenders the money bid, the sheriff is bound to make the deed, and if the purchaser refuses to complete the purchase, the sheriff has a right of action, and may sue and recover the purchase-money. And it has been held in North Carolina† that such a contract is not within the statute of frauds, which requires contracts in reference to land to be in writing. Lord Hardwicke held, in *Attorney-General v. Day*,‡ that judicial sales did not come within the purview of the English statute of frauds.

Railroad Franchise—Subject to Execution Sale.—The English and American doctrine agree that “the franchise and attendant privileges are confided to a particular political person, and not subject to sale or transfer to any other person or corporation, without the positive provisions of law.”§

But the statutes in some of the States, if not in all, or the acts of incorporation provide for the power to execute deeds and mortgages of the franchise, and for sale under execution.|| At common law the franchise of a corporation was not subject to sale under execution, though the tangible property might be sold. But the sale of the franchise and property of a corporation has no operation to destroy the corporate existence, nor to transfer the general powers and obligations of the corporation.¶ The legislature confers a variety of powers and liabilities on these corporations, and they must act within the power conferred, or their acts are *ultra vires*.

The creation of a mortgage, lien, transfer, and the issuance of

* Roer, *Jud. Sales*, § 604.

† *Tate v. Greenlee*, 4 Dev. Law, 149; likewise, in South Carolina, *Jenkins*

v. Hogg, 2 Con. Rep., 821.

‡ *Attorney-General v. Day*, 1 Ves. Sen., 221.

§ *Jones, Railroad Securities*, p. 1-3, English and American cases there cited
State v. Rives, 5 Ire. (N. C.), 297.

|| *Statute of North Carolina, Revised Code*, ch. 26, §§ 9-13; see *Taylor v. Jenkins*, 6 Jones, 316, for a construction of the act.

¶ *Freeman on Executions*, 180.

bonds are all the result of a statutory *power*, and must be followed.*

The sale of a *franchise* by execution must strictly follow the statute ; but it is not the purpose to pursue this question in detail.

CHAPTER XI.

OF JUDICIAL SALES.

IN the controversies in regard to real property, judicial sales constitute a prominent feature. These sales are supposed to be done *pendente lite* ; they are sales in court, and in some sense the court is the vendor. These sales are generally had through the instrumentality of a master, clerk, commissioner, or other person appointed by the court, who acts under the orders of the court, and is subject to the control of the court ; he accepts the offer of a purchaser, and reports the same, and, if confirmed by the court, it thereby becomes a judicial sale.†

These sales are the result of proceedings for partition, various chancery decrees, applications to sell lands to pay debts, the conversion of realty into personalty, and other cases which might be mentioned. The most usual mode of passing title *invitum* is by a sheriff's deed founded on a judgment, execution, and sale, but an execution sale is not a judicial sale.‡

Some of these sales are based upon special statutes, which must be strictly followed, the special tribunal must have jurisdiction of the subject-matter, the required parties must be made, and other requirements in the statute observed, such as the power of a probate court to order the sale of lands at the instance of the personal representative, to pay debts.§

* Eldridge v. Smith, 34 Vt., 496.

† Roer on Judicial Sales, § 1, note 2, where numerous authorities are collected.

‡ Griffith v. Fowler, 18 Vt., 394 ; McKee, sheriff, v. Lindberger, 69 N. C., 240 ; Lasell v. Powell, 7 Cold. (Tenn.), 278 ; Childress v. Hunt, 2 Swan, 487 ; Houston v. Aycock, 5 Sneed, 406 ; Roer, Jud. Sales, §§ 13, 16 ; Forman v. Hunt, 3 Dana, 621 ; Girard Life Ins. Co. v. Farmers' and Mechanics' Bank, 57 Penn. St., 397 ; Watson's Admr. v. Violet, 2 Duvall, 332.

§ Halleck v. Guy, 9 Cal., 181, 195.

In the case of McKee, sheriff, v. Lineberger, *infra*, Ch. Justice Pearson marks the distinction between execution and judicial sales as follows: "It will be seen that a bidder at a sheriff's sale occupies a relation altogether different from a bidder at a sale made by order of a court of equity, either by its clerk and master, or by a commissioner, for then the court takes the matter into its own hands, and *makes the sale* for the *parties*, holding the cause for further directions, taking the bidder under its protection and control, so as to relieve him from his bid, if there be ground for it, or to compel him to perform his contract specifically, and managing the whole proceedings until the sale is in all things carried into effect; whereas, the sheriff makes the sale by himself, without any confirmation or other act of the court, and acts by force of a statutory power to sell, receive the price and make title, so the court has no priority or control over the bidder, and the sheriff is left to his own action."

The sheriff may recover the purchase-money in his own name, and may execute the deed, though he goes out of office (save where there is a statutory provision to the contrary), and it will relate back to date of sale, or of the lien, if any.

This was said to be "familiar" learning.*

The courts of Maryland say, in a sale for purchase-money: "It was a proceeding *in rem*, and by the decree the land was condemned to pay the claim of the party who sold it, and in whom the legal title still remains." "Although the court, in the execution of this decree, and others of a like nature, employs a trustee, that officer is its agent, the court itself being the vendor, acting through the instrumentality of its agent."†

Says Mr. Roer, in his treatise on Judicial Sales: "In a legal sense, the sale is made by the court itself, in enforcement of its own orders and decrees, wherein is described the property sold. The person who conducts the same is merely the instrument or means used by the court to bring about such executory agreement, as the court closes, if satisfied therewith, by final act of confirmation, which makes the court the vendor. Such sale is unlike a sheriff's sale on ordinary common law, or statutory execution,

* Smith v. Brittain, 3 Ire. Eq., 351; Williams v. Council, 8 Jones L., 229.

† Hurt v. Still, 4 Md. Ch. Decs., 391, 393; 1 Gill. & J., 1, 8; to the same effect in Vandever v. Baker, 13 Penn. St., 126.

which is a *ministerial* and not a *judicial* act, and in making which the law regards the officer, and not the court, as the vendor."*

In sales under authority of the Court of Chancery, the inquiry might be, who are the real parties to the contract? To a contract of sale made under a decree of this court, "neither of the litigating parties can be considered as the vendor, although they, with others, such as creditors who may be allowed to come in afterwards, may be very materially interested in the sale. The plaintiff cannot be considered as the vendor, because, oftener than otherwise, he has no title, always states his inability to sell, and prays the court to decree that a sale be made. The defendant cannot be the vendor, because he always positively refuses to part with his property unless forced, or sanctioned in so doing by the power of the court. If, then, neither of the litigating parties can be separately deemed to be the vendor, it is clear that they cannot both together be so considered."†

In cases of this character it is the "*court itself, for the benefit of all parties interested, who is the vendor.*"

In *Forman v. Hunt*,‡ the Supreme Court of Kentucky uses this language in drawing the distinction between sheriff's sale at law and judicial sales: "Sales under execution are made by an officer of the law, who is required by law, as well for the benefit of plaintiffs and defendants as others who may be injured by his official defalcations, to give bond and good security for the faithful discharge of his duties; the law is the only guide of the sheriff, his sales are perfect and complete, and title passes to the purchaser without confirmation (ordinarily) of the court; but a commissioner appointed by the chancellor to sell, is the mere *ministerial* servant and agent of the chancellor. He has no guide but his instructions in the decree, gives no bond, must report to the court; the agreement to sell, made by him, is not valid until sanctioned by the chancellor.

"The highest bidder at sales under decree does not, like a bidder at sheriff's sale under execution, acquire any independent right to have the purchase completed; but he is nothing more

* *Gowan v. Jones*, 10 S. & M., 164; *Griffith v. Fowler*, 18 Vt., 394; *Campbell v. Johnson*, 4 Dana, 186; *Armor v. Cochrane*, 66 Penn. St., 308; *Bozza v. Rowe*, 30 Ill., 198; *Andrews v. Scotton*, 2 Bland, 629.

† See *Griffith v. Fowler*, *infra*.

‡ *Forman v. Hunt*, 2 Dana, 621.

than a preferred bidder, or proposer for purchase, *subject* to confirmation by the court.”*

A court in Pennsylvania has said: “The word execution has always been understood as meaning a *writ*, to give possession of the thing recovered by judgment or decree. It is clearly distinguished from a mere order of sale.”

It is true that Mr. Justice Grier, in *Griffith v. Bogert*,† speaks of execution sale as a *judicial* sale, but the case having come from Missouri, where the statute requires sheriff’s sales to be reported for confirmation, the language had reference to that case only.

The loose habit of classing execution sales with judicial sales in head-notes and indexes is not accurate and entirely without authority, for the distinction is well defined. It is true that in some of the States, as in Missouri, the law requires the sheriff to return his sale for the approval of the court, and in cases of this kind the difference might not be so readily marked.

We will only mention one other distinction in this place between execution and judicial sales, and that in the language of Mr. Roer: “The decree of sale is merely *interlocutory*,‡ made in the course of judicial proceedings, and the final decree is that of confirmation after the sale is made. The judicial sale occurs while the cause is still pending, but the execution issues and the execution sale is made *after* final judgment, and then the cause is ended. The sheriff sells what he can find, but the commissioner sells only what he is ordered to sell. The buyer, by the latter, becomes a party to the proceedings, and is in court subject to its jurisdiction, but not so the purchaser at execution sale at law.”

Rights and Liabilities of Purchasers at Judicial Sales.—This *preferred bidder*,§ on a confirmation by the court, becomes the purchaser, and is entitled to deed under the orders of the court. Some of the States provide for a registered decree having the force and effect of a deed. Most usually the clerk and master

* *Bussey v. Hardin*, 2 B. Mon. (Ky.), 407.

† *Griffith v. Bogert*, 18 How., 158.

‡ This interlocutory order of sale is under the control of the court while the suit is pending. *Shinn v. Smith*, 79 N. C., 310; 2 *Murphey*, 383; 6 *Jones's Equity*, 4; *Miller & Green v. Justice*, 86 N. C. Reports.

And, but for statutory regulation, the decree being merely *interlocutory*, no appeal would lie to a higher court.

§ See *Miller v. Feazor et al.*, 82 N. C., 192.

commissioner, or other agent of the court, makes a deed to the purchaser, on payment of the purchase-money, which must be registered like other deeds before offered in evidence on the trial.

This *preferred* bidder is, up to the time of getting the deed, in the attitude of a party to the proceedings in which the sale is had; the court can be invoked to require specific performance of the contract, dependent upon the payment of the purchase-money. And the purchaser, before payment of the purchase-money, can resist the same on making it appear that the title has failed, or if a title tendered be inferior to that offered for sale.

The court, as a general rule, can adjust all the equities of the parties in interest, and when it is made to appear that a party in interest is not before the court he will be brought in by the proper order. The case of *Burgin v. Burgin*,* recently decided by the Supreme Court of North Carolina, presents a strong case of the power of the court to protect the rights of the parties, not only the purchaser, but *all* the parties interested in the subject-matter of the controversy. The heirs-at-law of James Burgin filed a bill in the old court of equity for partition sale. John D. Burgin was the purchaser (one of the tenants in common), who gave note and security to clerk and master for the purchase-money.

This purchaser went into possession and continued the same for several years, and in the meantime executed his individual note to each of the other co-tenants for his several share of the fund; he then filed a receipt from them (*purporting payment*) with the clerk and master, and obtained credit on his note to nearly the full amount of the purchase-money. The cause had been retained for further orders, and John D. had no deed from clerk and master. The several co-tenants made application to have the land subjected to payment of their shares of the purchase-money, thereupon L. and B. (who had obtained judgment against John D. Burgin, and sale and sheriff's deeds for his interest in the land) asked to become parties and insisted on the title being in them by virtue of the sheriff's sale, or at least they had a right to call for the legal title.

The court held that the land being in custody of the court the tenants in common could subject the land to the payment of the purchase-money, and that John D. Burgin had nothing which

* *Burgin v. Burgin*, 82 N. C., 196.

could pass by execution, and that the execution of his note to the co-tenants (not being paid), and obtaining the credit with the clerk and master did not amount to a payment. The court in this case also affirmed the doctrine adhered to in that State, that a purchaser at execution sale took the title subject to all prior equities, *whether he had knowledge of the equity or not.**

So in this same case, if the title to the property had failed, or the title had appeared inferior to that sold, the purchaser, John D., could have been relieved from the payment of the purchase-money, or entitled to an abatement. This latter relief is the result of the rule in North Carolina that the doctrine of *caveat emptor* does not apply to the purchaser at a judicial sale.†

Caveat Emptor—How Understood in Judicial Sales.—Mr. Roer, in his work on *Judicial Sales*, § 174, says: "The rule is as to all judicial sales, except as regards fraud, that the maxim *caveat emptor* applies. Let the buyer beware. There is no warranty of title or quality." Then says, again, § 476: "The rule of *caveat emptor* applies in all its rigor to judicial sales." He then cites a dictum of the Supreme Court of the United States in *The Monte Allegre*,‡ but the point was not in judgment, as the question arose in an admiralty case.

Now we do not assent to this doctrine thus broadly stated. The repeated reference to the doctrine of *caveat emptor* in execution sales and in judicial sales tends to confusion. The distinction between execution sales and judicial sales is well defined, as we have seen. And it may truly be said, when the authorities are carefully examined, that the doctrine of *caveat emptor* as applied to execution sales has but a limited application to judicial sales. For instance, in case of execution sale in a suit for the purchase-money the fact that the defendant in the execution had no title whatever in the property, or of an interest of less value than the purchaser supposed, is no defence to the action for the purchase-money.§ In this instance *caveat emptor* does apply in full force, subject, however, to the protection in certain cases on account of want of notice.

* *Hicks v. Skinner*, 71 N. C., 539; 1 Dev. Eq., 470; *Rollins v. Henry*, 78 N. C. R.

† See Roer, *Judicial Sales*, §§ 148-161.

‡ 9 Wheaton, 616.

§ *Freeman, Ex. Sales*, § 301, and authorities cited.

But is this so in judicial sales? Mr. Roer himself, in a previous paragraph, § 150, states the doctrine as follows: "But such purchaser at a judicial sale may not be thus compelled to complete the sale if the title be defective, nor to pay the consideration-money until the defect, if there be one, is obviated; for although the rule *caveat emptor* applies after the sale is closed by payment of the purchase-money and delivery of the deed, if there be no fraud, yet the buyer, if he discover the defect beforehand, will not be compelled to complete the sale." And this is so after the confirmation of the report of sale.

Here is the difference: The purchaser at execution sale can be compelled to pay the consideration, although he discovers the failure of title, but in a judicial sale, a sale by the court, this great injustice is not done. If this were so, a court of equity would be in the attitude of compelling a party to pay money without a *consideration*, which is totally inconsistent with the principles administered by that court in all civilized countries. It is true that a purchaser at a judicial sale may lose, by want of diligence, perhaps, in not discovering the defects of his title before he pays the consideration and takes a deed. The money having passed from him, and having no warranty of title, he is without a remedy in many cases. A purchaser may buy land at the sale, by an administrator, pay his money, take a deed, and it might turn out that a valid lien had attached to the land, or the intestate had no title, he would be without remedy.*

So it appears that the purchaser at a judicial sale holds a very different position to that of a purchaser at an execution sale. In North Carolina this question has been discussed with more reason and satisfaction than is to be found in most of the cases.†

In *Shields v. Allen*, *infra*, it is held that in that State *caveat emptor* does not apply to *judicial sales*. Also, in *Edney v. Edney*, *infra*, and *Etheridge v. Venoy*, *infra*, the same doctrine is affirmed. In the latter case the position was taken that the

* *Walden v. Gridley*, 36 Ill., 523; *Creps v. Baird*, 3 Ohio St., 277; *Miller v. Finn*, 1 Neb., 254; *Ramsey v. Blalock*, 32 Ga., 376.

† *Miller v. Feazor et al.*, 82 N. C., 192; *Shields v. Allen*, 77 N. C., 375; *Batchelor v. Macon*, 67 N. C., 181; *Cox v. Jerman*, 6 Ire. Eq., 526. In *Edney v. Edney*, 80 N. C., 81, the reasoning of Judge Dillard is conclusive. *Etheridge v. Venoy*, 80 N. C., 78. See, also, *Scott v. Bental*, 23 Gratt., 1; *Earl v. Turton*, 26 Md., 34.

purchaser could not obtain relief if he had *knowledge* of the hostile claim at the time of the purchase; but the court said, that in a voluntary sale a party could purchase property with a knowledge of some incumbrance, the nature of which could not be ascertained without a lawsuit, could, after the same was ascertained, buy up this incumbrance and charge the same to the vendor, in the payment of the purchase-money; so, in this case, the purchaser at a judicial sale ascertained the incumbrance by a lawsuit before he paid the purchase-money, and the court say he was entitled to relief, and consequently not bound to take a defective title. The principle established in these cases is that in a judicial sale a valid and complete title is presumed to be offered in the absence of a different representation, and that the purchaser is not bound to pay the purchase-money and accept a defective title or an inferior estate, and a total failure of title is sufficient to discharge the purchaser from the payment of the purchase-money *in toto*.

When a Re-sale is Proper—Opening the Bidding, etc.—Of course if a judicial sale is set aside for fraud, irregularity, mistake, surprise, gross inadequacy of price, or for such other cause, not involving a want of jurisdiction or power in the court to sell, a re-sale may be ordered. Sometimes the rights of the original purchaser is affected by an advance on the bid, either before or after confirmation by the court. The English Chancery practice* is that the sale until confirmation by the Chancellor is treated as merely a bid, and subject to a proposition of advance. This practice of holding the bid subject to an advance is that followed by several of the States.†

But while the practice may not be uniform in the States, yet there is one rule of universal application, to wit: the power, duty, and right of the court to *supervise, protect, and preserve the parties from all fraud, unfairness, and imposition*. And nothing tends more to the ends of justice than the requirement of good faith

* 6 Vesey, 513; 8 Ib., 214.

† Childress v. Hunt, 2 Swan., 487; Hay's Appeal, 51 Penn. St., 58; Wright v. Cautzon, 31 Miss., 514; Teel v. Yancey, 23 Gratt., 691; Hudgins v. Lanier, 23 Gratt., 494.

See this question fully discussed in July No. Southern Law Review for 1874, pp. 423-443.

and fair dealing in all judicial sales. It is only in this way that courts of equity can protect the rights of minors and frequently married women, and persons of weak mind, or aged and infirm.

If, therefore, for any cause the sum bid is greatly inadequate, the court should not confirm the sale, but reopen the biddings, and even after confirmation in proper cases. The usual practice is, for the party offering the advance, to present a petition to reopen the biddings, stating the amount proposed to advance on the former bid. The sum of ten per cent. and costs has often been considered sufficient to cause an order for re-sale.* It was held in Virginia, in the case of *Hudgins v. Lanier*,† that the court would not open the biddings for an advance of one hundred dollars on a bid of five hundred. The fact that the code system has superseded the forms for a chancery court, is no reason why the court having all the power to do justice should not adopt the same rule in all sales ordered. In regard to this question Mr. Roer, § 584, pertinently says: "If it become apparent to the court, from the face of the proceedings or otherwise, that the rights of minors have been illegally invaded or compromised, the court will, on its own motion, set aside or decline to confirm the sale, and will order a re-sale of the property without waiting to be invoked so to do. It is in such case the duty of the court, in the exercise of its high powers as guardian of all minors, to protect the interests of those whom equity makes the special objects of its care; and the purchase of the property by the guardian *ad litem* of an infant owner is a case loudly calling for such interference."

On this subject of reopening the biddings, Judge Kent, in his *Commentaries* (vol. iv., 192) ignores the English practice, and says, with us: "The sale at public auction is ordinarily a valid and binding contract as soon as the hammer is down. The master sells at public auction on due notice, and the purchaser becomes entitled to a deed, unless there be fraud, mistake, or some occurrence, or some special circumstance affording, as in other cases, a proper ground for equitable relief."• This doctrine of Judge Kent was pressed upon the Supreme Court of Tennessee in the case of

* *Horton v. Horton*, 2 Brad. (N. Y.), 200.

† *Hudgins v. Lanier*, 23 Gratt., 494.

Owen v. Owen,* but was not sustained by that court, but the English practice adhered to. This case was sustained in the case of Childress v. Hunt, *supra*; so that this question is well settled in that State in favor of reopening the biddings on a reasonable advance before the confirmation of the sale. After the confirmation the court will not reopen the biddings except in cases which would justify setting aside the sale altogether.† In Maryland the biddings are never reopened merely to let in another and higher bidder; but if, either before or after ratification of the sale, there be any injurious mistake, misrepresentation, or fraud, the biddings may be opened, and the property again placed on the market.‡ As to the general power of a court of chancery over its orders, sales, and decrees, see Deadrick v. Smith.§

The sale is not perfect until confirmation; because, in case of personal property, if the property is lost by fire before confirmation, the purchaser is not bound for the purchase-money; and, until this confirmation, he is not bound to perform his contract by paying the purchase-money. And the contract being thus incomplete, there is no good reason why the court should not in a proper case reopen the biddings.||

The per cent. which the court will require advanced on the bid is not well settled even in England; many of the courts thought ten per cent.; but Lord Eldon thought this not a safe rule.¶

The exercise of this power of allowing the biddings to be opened and ordering a re-sale must, in some degree, depend upon the circumstances of the particular case in which the application is made; yet there are certain established principles by which the discretion of the court must be regulated.** The person proposing the advance need not be a party to the suit. A party who has appeared at the sale and forbid the same, and thereby threw doubt on the title, should not be allowed to make the advance, and thereby take advantage of his own wrong.

* 5 Hump., 335.

† Henderson v. Lowery, 5 Yerg., 240.

‡ Anderson v. Foulke, 2 Har. & Gill, 355-6; Gordon v. Sims, 2 McCord, ch. clviii., clxv., and note of reporter.

§ 6 Hump. (Tenn.), 146. See Stephens v. McGrudor, 31 Md., 168; 37 N. Y., 155.

|| 2 Daniel Ch. Prac., 1455, 1460.

¶ 7 Vesey, 420. Sometimes a less sum than ten per cent. has been held sufficient: 5 Vesey, 655.

** 11 Hump. (Tenn.), 278.

The late case in North Carolina of Attorney-General *v. Roanoke Navigation Company* (to appear in 86 N. C. Reports), sustains the English rule. In that case they say the court looks with jealousy on the application to open the biddings when it comes from a bidder at the sale.

Other Reasons for Setting the Sale Aside.—A judicial sale may be set aside for the following additional reasons :

- I. *For great inadequacy of price.*
- II. *For irregularity.*
- III. *Mistake and misrepresentation.*
- IV. *For surprise.*
- V. *For fraud.*
- VI. *On account of reversal of the decree.*

It is not the purpose of the author to enter into a minute discussion of all these several causes, as they are founded upon principles of familiar learning, and treated fully in the books on equity jurisprudence. But only a few points of a general character will be here noticed.

As to *inadequacy*, if this be the cause for setting aside a judicial sale, then the inadequacy must be so great as in itself to raise a presumption of *fraud*.* If there be circumstances of unfair advantage at the time, these will always be weighed with the great inadequacy of price bid.

Applications for setting aside a decree for irregularities alone must be made by some of the parties in interest, and within a reasonable time and diligence, and before the intervening of other interests. In the absence of a statute allowing the same, an order or decree cannot be set aside on motion filed after the term at which the decree was rendered. Some of the recent codes allow twelve months within which to obtain relief from a judgment taken by "mistake," "inadvertence," "surprise," or "excusable neglect."†

In the absence of some regulation of this kind by statute the party complaining of the irregularity must either apply at the same term or appeal to a higher court for the correction of errors.

The only other mode of inquiring into a judgment is by an

* Roer, *Judicial Sales*, § 549, note 1, § 550.

† Code of N. C., Battle's Revisal, chap. 17, § 133.

original proceeding, such as a bill of review, or an original bill in the nature of a bill of review.

Difference between Direct and Collateral Impeachment of a Decree.—If a court acts without authority, and has no jurisdiction of the subject-matter, then the order, decree, or judgment is utterly void, and will be disregarded, even when it comes in collaterally, that is, between parties other than the parties to the proceedings. Being *void*, the judgment is not evidence in behalf of any person, nor for any cause. It needs no petition or other proceedings to set it aside. It stands as a nullity and will be disregarded. This principle has been illustrated in the several cases decided by the Supreme Court of the United States, growing out of the Confiscation Act of Congress, passed 17th July, 1862.

It was held in *Bigelow v. Forrest** that only the *life-estate* of the party was subject to condemnation under the Constitution of the United States and the acts and resolutions of Congress. And that although the party owned the fee-simple interest, and the deed of the marshal professed to convey *all of the party's interest*, yet the court having no power to pass an order of confiscation for a greater interest than the life-estate, the deed was void to that extent, and the judgment could be impeached in a collateral proceeding.

Another principle was also decided in the case of *Day v. Micou*, *infra*, that the power to confiscate only extended to whatever interest the party had, and hence if a mortgage had been previously made the lien could be enforced against the purchaser at the marshal's sale. This controversy grew out of the decree of the United States court, acting under the Confiscation Act in regard to the property of Judah P. Benjamin, of Louisiana. In the *decree*, the court attempted to invalidate the mortgage on the property, and the marshal was ordered to enter satisfaction on the same. Day bought at the marshal's sale; paid a large sum for the same; subsequently the mortgagee filed a bill to establish the same and to declare void the decree of confiscation, which

* *Bigelow v. Forrest*, 9 Wallace, 339; *Day v. Micou*, 18 Wall., 156; *Semmes v. United States*, 91 U. S., 26; see *Confiscation Cases*, 20 Wall., 92. As to the doctrine of impeaching a judgment collaterally see also *Thompson v. Tolmie*, 2 Pet., 157; 2 *Howard*, 43; *Haywood v. Collins*, 60 Ill., 328.

was sustained by the Supreme Court of the United States. It was contended that on the seizure of the property it became the property of the United States, and that it was a proceeding *in rem*, and the title passed *independent of all liens*.

Day having paid the money to the United States, and failing to get a title, has applied to Congress for repayment of the money, and a committee of each House has made a favorable report, to which reference will be had.

Hence it may be said that the doctrine of *caveat emptor* applies to all purchasers at judicial sales arising under these confiscation acts.

In the case of *Bigelow v. Forrest*, *supra*, Justice Strong speaks of this power to confiscate the life-estate only as presenting some curious anomalies in law. He says: "We do not care to speculate upon the anomalies presented by the forfeiture of lands of which the offender was seised in fee, during his natural life and no longer, without any corruption of his heritable blood, or to inquire how, in such a case, descent can be cast upon his heir, notwithstanding he had no seisin at his death. Such speculations may be curious, but they are not practical, and they can give no aid in ascertaining the meaning of the statute."

But, if the court had jurisdiction, and the proceedings are not absolutely void, the decree and final action of the court cannot be impeached collaterally, but it must be a proceeding directly for that purpose by a party to the proceedings, or some person whose interest is affected by the final action of the court. It is almost an axiom that fraud infects judgments at law, and decrees of all courts.*

An original action without leave of the court may always be brought to impeach a judgment for fraud, within a reasonable time, by the party aggrieved. As to what constitutes fraud in such cases, who are proper parties, and the effect of long lapse of time, are questions not to be discussed in detail here. It is of frequent occurrence that the practitioner is confronted with a conveyance between private parties, and judgments, and decrees, which involve the necessity of a proceeding directly to have either the one or the other declared void on account of fraud.

* Story, Eq. Pleading, § 426.

Sometimes, especially under the code practice, this relief is obtained incidentally to the main relief sought in the same proceedings.

The Rights and Liabilities of the Parties to a Private or Judicial Sale, when the Title Fails, or Fraud or Mistake has Intervened.

—Incidental to and intimately connected with real estate controversy are many questions growing out of the rights and liabilities of the parties to sales, either private or judicial, when the title to the property sold *fails*, and the *consideration-money has been paid*, and in cases where there is no written warranty. Of course, in private sales of land with a covenant of warranty, an action lies, and the rules of evidence to establish the damage are fixed with reasonable certainty. But, in the absence of covenants, and in judicial and execution sales, and especially where the government, state, or corporations, profess to dispose of a title, many nice questions may arise, not discussed thus far, on the subject of judicial or execution sales.

Under this head the writer is of opinion that he could not do better for the profession than to present in this connection the "Reports of the Senate and House Committees of Claims to the XLVIIth Congress, in the matter of L. Madison Day, of Louisiana." These reports are valuable for the elaborate display of authorities on the points involved, which will tend to save labor to the practitioner in many cases where questions of this kind arise.*

The report to the House was made by Mr. Mason, and the report to the Senate was made by Mr. Conger. The authorities cited throw much light on the doctrine of execution and judicial sales which we have under discussion.

Says the report to the Senate:

The material facts are as follows:

1. Judah P. Benjamin, a member of the cabinet of the so-called confederate government, was the owner (subject to the mortgage hereinafter mentioned) of a certain tract of ground, described as square No. 63, in the town of Hurstville, parish of Jefferson, Louisiana.

* The questions arose out of the attempt to sell the lands of Judah P. Benjamin by a decree of confiscation.

2. The said Benjamin, in July, 1858, mortgaged said real estate to one Mrs. Anna D. Micou, to secure the payment of \$10,000, with interest at the rate of eight per cent. per annum. This mortgage was duly recorded, in 1858, and at the time of the seizure under the Confiscation Act, as hereinafter mentioned, was wholly unpaid, and the mortgage unsatisfied.

3. January 26, 1865, a libel was filed in the clerk's office of the District Court of the United States for Louisiana, by the United States district attorney, against the said real estate. The case was entitled "The United States v. Two Squares of Ground, the property of J. P. Benjamin." The libel averred the seizure of the property by the marshal, and "that Judah P. Benjamin is and was, on the 17th day of July, 1862, and previously thereto had been, the owner of the above-described property." The prayer was, among other things, that "process of monition may issue against the said property, and the owner and owners thereof, and against all persons interested or claiming an interest therein, warning them, etc., to appear and answer," and for an order of publication, etc.

4. An order of publication was issued January 26, 1865, directing that "notice be given to the owner and owners of said property and real estate, and all persons interested or claiming an interest therein, to appear and answer this information on the 13th day of February, 1865, and show cause, if any they have, why said property and real estate, and the right, title, and interest therein of the said J. P. Benjamin should not be condemned and sold according to law," said notice to be posted up, and published in the *True Delta* newspaper twice a week previous to said 13th day of February, 1865, the first publication to be on or before the 28th January, 1865.

5. The warrant issued January 26, 1865, directing the marshal to seize the property, "and to cite and admonish the owners, and all and every other person or persons having, or pretending to have, any right, title, or interest in or to the same, to appear," etc. And the monition as published followed the language of the warrant.

6. March 18, 1865, default was entered, and "all persons interested in the property seized" were pronounced in contumacy and default, and it was ordered and decreed that the property be sold as forfeited to the United States, and the proceeds to be distributed according to law.

7. March 27, 1865, writ of *venditioni exponas* issued, and May 15 the marshal returned that he had, after due notice, sold the property, together with another square (No. 45, in same town) to L. Madison Day, for \$6100.

8. Previously, to wit, on the 18th day of March, 1865, the

court had made and entered of record the following general order, applicable to proceedings in confiscation cases.

On motion of Rufus Waples, United States attorney, and M. Taylor, Esq., attorney for the marshal, on suggesting that the eighth section of the act to suppress insurrection, etc., approved July 17, 1862, that the several courts aforesaid (the United States district courts) shall have power to make such orders, establish such forms, and decree and sale, and direct such deeds and conveyances to be executed and delivered by the marshal thereof, where real estate shall be the subject of sale, as shall fully and efficiently effect the purposes of this act, and vest in the purchasers of such property good and valid titles thereto, it is ordered that, in all cases where real estate is condemned and sold under the act aforesaid the marshal shall cause all mortgages resting against the property to be sold to be cancelled, and shall attach the certificate of the recorder of mortgages to the deeds given to the purchasers, showing the cancellation of the same. It is further ordered that purchasers of property deposit the amount of their bids with the marshal, subject to distribution by the court, after fixing the cost, the state, national, city, and drainage taxes to be paid, the receipts therefor to be attached to the deeds given.

9. In pursuance of the foregoing order, there was annexed to the deed executed to said Day a certificate of the recorder of mortgages for the parish of Jefferson, dated May 12, 1865, stating that the aforesaid mortgage from Benjamin to Micou "has been this day cancelled and annulled from the records of this office."

10. The granting clause in the marshal's deed to said Day is as follows:

Now, therefore, know all men by these presents, that I, the United States marshal aforesaid, in consideration of the premises, and by virtue of the laws in such case made and provided, and under the authority of the acts of Congress on the 6th of August, 1861, the 17th of July, 1862, and the 3d of March, 1863, in relation to confiscation, do hereby sell, transfer, assign, and set over unto the said L. Madison Day, as aforesaid, his heirs, administrators, executors, and assigns, all and singular the above-described property, with all the buildings and improvements thereon, rights, ways, privileges, hereditaments, and appurtenances to the same belonging and in any wise appertaining, *to have and to hold the above described property*, with all the buildings and improvements thereon, rights, ways, etc., unto the said L. Madison Day, his heirs and assigns, as aforesaid, to his and their proper use, benefit, and behoof forever.

11. Upon receiving said deed, Mr. Day paid to the marshal the amount of his bid, \$6100. The marshal returns that the costs amounted to \$1276.35, and the balance, to wit, \$4823.65, was by the court ordered to be paid into the treasury. The latter sum was accordingly covered into the treasury on the 31st day of December, 1866, as appears from the certificate of the Acting Secretary of the Treasury, which is submitted to your committee.

12. Mr. Day entered into possession under the marshal's deed. There was no appeal from the decree of condemnation in the confiscation case, but Thompson Micou et al. subsequently brought suit against Day, in a court of the State of Louisiana, to foreclose the mortgage above referred to, and which had been cancelled as

aforesaid under the order of the United States District Court. The suit was prosecuted upon the theory that the order aforesaid, and the attempted cancellation of the mortgage made in pursuance thereof, were void acts, being unauthorized by the confiscation laws. This view was sustained by the Supreme Court of Louisiana, and, upon writ of error, by the Supreme Court of the United States.* The mortgage was foreclosed, and Day was ejected from the premises.

13. By these adjudications it was settled that the decree of condemnation under the Confiscation Act operated only upon the interest of J. P. Benjamin, and did not in any manner affect the rights of the mortgagee, and that, therefore, Day's purchase was in law subject to the mortgage lien, notwithstanding the order of the United States District Court directing the cancellation of the mortgage and its actual cancellation in pursuance thereof.

14. The value of this property at the date of the sale was not equal to the sum due on the mortgage against it, which was over \$15,000. If the property had been sold subject to the mortgage, it would have brought nothing. The amount bid and paid by claimant for this square of ground was \$5400.

From these facts it is clear that the United States District Court, acting under the Confiscation Acts, assumed to sell and convey to Mr. Day the title in fee of the premises, and that Mr. Day, upon the faith of the proceedings, bid and paid for the unincumbered title in fee, and that the purchase-money paid therefor, after paying costs, went into the treasury of the United States. It is also clear that the property for which Mr. Day bid, and for which he paid his money, and which the marshal's deed purported to convey to him, was not conveyed; that in fact he received nothing from the United States for the money which he paid to the marshal for said square of ground.

The question is, whether under the circumstances the government is not in law, as well as in equity and justice, bound to return the purchaser his money. Unquestionably the money was paid to the United States under a mistake, not of fact, but of law; but it was not alone the mistake of the claimant, but also of the agents of the government. These agents assumed that they had the legal right to sell and convey the property in question to claimant free from incumbrance. If it be important to inquire what reason they had so to think, it may be said that the proceeding was declared by statute to be a proceeding *in rem*, in which "the proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases."† This opinion might

* Day v. Micou, 18 Wall., 156.

† Confiscation Act, § 7.

have been strengthened also by the provisions of section 8 of the Confiscation Act, which gave the several district courts power to make such orders, establish such forms, etc., as may be necessary to vest in purchasers good and valid titles to such property. But the ground upon which the mistake or error was based cannot be very material, as it is conceded that by several decisions of the Supreme Court since rendered, it is now settled that the court, the marshal, and claimant were alike mistaken in supposing that proceedings in confiscation could reach beyond the interest of J. P. Benjamin in the property.

The acts of the marshal in attempting to sell and convey to claimant the title in fee from the lien of the mortgage were unauthorized acts, although directed by the decree of the court; for the decree thereof was void. These acts being unauthorized, would not be binding upon the government but for the fact that the government has, by accepting the purchase-money and covering it into the Treasury, ratified and adopted them.

We submit that the petitioner is, on the plainest principles of common justice, entitled to a return of his money. For the government, no more than an individual, can have any right to retain money which it has obtained without consideration and which in justice and good conscience belongs to another.

In *White v. The Bank*, 64 N. Y., 319, the court well says: "The equitable action for money had and received will lie against one who has received money which in conscience does not belong to him."*

The principle of these decisions is quite conclusive against any right in the government to retain the money of petitioner. For surely the government cannot in conscience be said to have any shadow of right or claim to money which it has obtained for property to which it had no title and from which its purchaser has been evicted, under the decision of its own highest court, by reason of the defectiveness and insufficiency of the title obtained from the government itself. For the government to refuse to refund money which it has obtained for property to which it had no title, and from which the purchaser has been evicted, would be to enrich itself at the expense of another. And for the government (or any one else) to enrich itself at the expense of another would be contrary to every principle of common honesty as well as natural justice.

In *Valle's Heirs v. Fleming's Heirs*, 29 Mo., 157, the court well says:

The maxim of the common law, "*nemo debet locupletari ex alterius incommodo*," is one of those general principles of natural equity which receive at once, without examination or discussion, the approbation of every cultivated and well-regulated mind.

* 9 M. & W., 54; *The Bank of Orleans v. Smith*, 3 Hill, 360.

Hence all the authorities hold that when a party receives money on a misrepresentation of title, expressed or implied, but which is void, the money must be refunded, as not being due, and as having been received without consideration, even though the misrepresentation may have been made through honest mistake and without any fraudulent intent to deceive or mislead the other party.*

For "a vendor," says the Supreme Court of the United States, "is bound to know that he actually has that which he professes to sell."†

So in *White v. Continental National Bank*, 64 N. Y., 320, the defendant "was held to a knowledge of its own title," and liable to refund money which it had obtained on an implied representation of title which was void.

And in *Smith v. Richards*, 13 Pet., 38, Mr. Justice Barbour well says:

The party selling property must be presumed to know whether the representation which he makes of it is true or false. If he knows it to be false, that is a fraud of the most positive kind; but if he does not know it, then it can only be from gross negligence; and in contemplation of a court of equity, representation founded on mistake, resulting from such negligence, is fraud.‡ The purchaser confides in it upon the assumption that the owner knows his own property and truly represents it; and as was well argued in the case in *Cranch*, it is immaterial to the purchaser whether the misrepresentation proceeded from mistake or fraud. The injury to him is the same, whatever may have been the motives of the seller.

Undoubtedly, then, the purchaser had a right to rely on the representations of the government, through its own officers, the court, and the marshal, that the property was to be sold free of mortgage, and was under no obligation to inquire for himself, as far as the government was concerned. He was in possession of the government's own declaration, through the court and the marshal, that the property was to be sold free of mortgage, if any such there was, and had a right to rely on that representation without inquiry.§

For when a vendor misrepresents the title, whether by design or honest mistake, the fact that the deed is on record is imma-

* *McCall v. Corning*, 3 La. An. R., 410, 413, 414; *White v. Continental National Bank*, 64 N. Y., 316; *The Continental National Bank v. The National Bank of the Commonwealth*, 50 N. Y., 575; *Guernsey v. Wormsley*, 28 Eng. L. & Eq., 256; *Baxter v. Duren*, 29 Me., 434; *Beebe v. Young*, 14 Mich., 136.

† *Allen v. Hammond*, 11 Pet., 72; *Hitchcock v. Giddings*, Daniel Rep., 1.

‡ 6 Ves., 180, 189; *Jeremy*, 385, 386.

§ *Boyce's Executors v. Grundy*, 3 Pet., 210, 218; *Mead v. Burin*, 32 N. Y., 275; *Brown v. Rice's Administrator*, 28 Gratt., 474; *Young v. Harris*, 2 Ala., 108; *Parham v. Randolph*, 4 How. (Miss.), 435, 451.

terial, as the doctrine of notice is inapplicable as between vendor and vendee.*

"If a vendor," says Chief Justice Sharkey, in *Parham v. Randolph*, 4 How. (Miss.), 451, "undertakes to make statements, he is responsible for them.

"For no man can complain that another has too implicitly relied on the truth of what he has himself stated."†

Nor does the fact that the court was mistaken in point of law as to its power and authority in making the order and representation that the property was to be sold free of mortgage, furnish any excuse or reason to the government for not refunding the money which it obtained solely through such mistake and misrepresentation.

It has been broadly laid down that money cannot be recovered back paid under a mistake of law. Upon an examination of the authorities your committee is constrained to disagree with this proposition.

Now, whilst it is, perhaps, a vexed question, and the authorities are conflicting as to whether or not a court of equity can relieve a party for a mere error or mistake of law (though the best considered cases, both in this country and in England, are decidedly in favor of relief to prevent intolerable injustice where an unconscionable advantage has been gained by mere mistake or misapprehension);‡ yet it is now well-settled that where the mistake or error has been induced or contributed to by the party seeking to take advantage of or profit by it, a court of equity, as well as a court of law, will relieve.

Judge Story, 1 St. Eq., sec. 137, expressly says that the rule in reference to a mistake of law "is relaxed in cases where there is a total ignorance of title, founded in the mistake of a plain and settled principle of law, and in cases of imposition, misrepresentation, undue influence, misplaced confidence, and surprise."

In *Jordon v. Stevens*, 51 Me., 78, 83, it is well said :

And there would be still stronger reasons for granting relief in such a case if the party from whom the property had been obtained *had been led into his mistake of the law by the other party.*§

And in *Brown v. Rice's Adm.*, 26 Gratt., 467, 470-1, it is distinctly and clearly shown that a court of equity will relieve for a mistake brought about by a misrepresentation of the law.

* *Parham v. Randolph*, 4 How. (Miss.), 435, 451; *Young v. Harris*, 2 Ala., 113; *Brown v. Rice's Administrator*, 26 Gratt., 774.

† *Reynell v. Sprye*, 1 D. M. & G., 660, 710, per Lord Cranworth, L. J.; *Rawlins v. Wickham*, 3 D. & J., 318; *Smith v. Reese River Silver Mining Co.*, L. R., 2 Eq., 264; *Colby v. Gadsden*, 15 W. R., 1185; *Bodell v. Stevens*, 3 B. & C., 675; *Brown v. Rice's Administrator*, 26 Gratt., 474.

‡ 1 St. Eq., §§ 133f, 138c, 138f, 138g.

§ *Sparks v. White*, 7 Hump. (Tenn.), 86; *Fitzgerald v. Peck*, 4 Littell (Ky.), 127. See, also, *Freeman v. Curtis*, 51 Me., 140.

Where a contract is executed under a mistake in point of law, which mistake is produced by the representations of one of the parties, the other may be relieved, as well as if the mistake was as to a matter of fact.*

And where a party has made a mistake to which the other has by his acts contributed, even unintentionally, the contract will be rescinded.†

In *Wheeler v. Smith*, 9 How., 55, where an executor, through mistake and misapprehension of law, represented to the heir that the will was legal and valid (that this was the opinion of all the lawyers he had consulted, and was his opinion); and that in the event of a suit, which he wished to avoid, and which would be attended with trouble, delay, and expense, the will would be sustained, but that if he wanted a sum of money, he could have it by way of a settlement and compromise, relief was granted from a release by the heir to the executor for twenty-five thousand dollars, notwithstanding the heir had stated to the executor that in his opinion the will was illegal, and that in case of suit it would ultimately be so declared, but that he supposed he would have to consider the will legal and valid, and accept the offer.

This case, therefore, illustrates in a high degree the extent to which a court of equity will go in granting relief where the party's conduct has been mainly determined by the misrepresentation of the law through innocent mistake and misapprehension of the other party.

And where the mistake of the law is mutual, but attributable to the *agent* of the party seeking to take advantage of it, equity will relieve.‡

In *Morgan v. Hammett*, 23 Wis., 41, where a probate judge, through mistake and error of law, supposed he was incompetent to grant an order of sale, by reason of his having been of counsel for some of the parties in interest, and transferred the case to the Circuit Court, which made an order of sale under which the property was sold, it was *held* on a bill filed to set aside the sale for want of jurisdiction and authority in the Circuit Court to make the order of sale that the sale was void, and that the purchaser "*surely should be repaid the money he had advanced upon it.*"

And in *Davis et al. v. Trustees Railroad*, 1 Wood's C. C. R., 661, where a receiver was in possession of mortgaged premises under foreclosure proceedings in a State court, and was disposed by the marshal under a decree in bankruptcy by a United

* *Evarts v. Strode's Adm.*, 11 Ohio, 488; *Drew v. Clarke, Cooke* (Tenn.), 380.

† *Torrance v. Bolton*, L. R., 14 Eq., 124; *Fane v. Fane*, L. R., 20 Eq. Ca., 698; *Torrance v. Bolton*, L. R., 8 Ch. Appls., 118.

‡ *Green v. Morris, etc.*, 1 Beas. Ch., 165; *Woodbury, etc., v. Charter Oak Insurance Co.*, 31 Conn., 517; *Cooper v. Phipps*, L. R., 2 H. L., 149, 164; *Fane v. Fane*, L. R., 20 Eq. Ch. Ca., 698.

States court, and the property was sold by the assignee in bankruptcy free of the mortgage, it was *held* on a bill filed by the receiver against the assignee in bankruptcy and the purchasers, that the sale must be set aside, and the purchase-money restored to the purchasers.

"This," says the court in the above case, page 666, "is clearly the justice of the case, and, in my judgment, the law is not contrary thereto."

So in this case the sale of the property free of the mortgage, under the order of the United States District Court, being void as to the mortgagee and the purchaser evicted from the property, he most unquestionably is entitled to a return of his money for which he has received no consideration.

In *City of Covington v. Powell*, 2 Met. (Ky.), 226, 228, the court says :

It may be regarded as well settled in this State that, where money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which, in law, honor, or conscience, was not due and payable, and which ought not to be retained by the party to whom it was paid, it may be recovered back.*

Indeed, there is no case to be found in the books where a party, as in this case, took nothing by his purchase and the other parted with nothing of any value, that a court of equity ever refused relief. And this more especially where the purchaser was induced to make the purchase through the mistake and misrepresentation of the law and facts by the other party.

For where a vendor, even through honest mistake, represents his title to be good when it is not, and the purchaser relying on the misrepresentation is thus induced to enter into the contract, a court of equity will relieve.†

And where there is a misrepresentation of a material fact which the other party believes and acts upon, it is immaterial in a court of equity whether the party making the statement knew it to be false or not, as it operates as injuriously as if it had been made by design.‡

Even where parties deal with each other under a mutual mistake as to their respective legal rights (the one supposing that he has the legal right and the other that he has none), and the one parts with nothing and the other acquires or takes nothing by his purchase, equity will relieve.§

* 4 Dana, 399; 3 B. Mon., 513; Met., 153.

† Bailey v. Jordan, 32 Ala., 50, 53.

‡ Lanier v. Hill, 25 Ala., 554, 558; Hardin v. Randall, 15 Me., 332; Champ-
lin v. Goyton, 6 Paige, 189; Rosefelt v. Fulton, 2 Conn., 129; 1 St. Eq., § 193.

§ Bingham v. Bingham, 1 Ves. Sen., 127; Hitchcock v. Giddings, 4 Price,
Ex., 135; Cooper v. Phipps, L. R., 2 H. L., 149, 164, 170; L. R., 1 Ch. Appls.,

Where a vendor intends to sell and the vendee to purchase a subsisting title, but which in fact does not exist, a payment of the purchase-money, says the Supreme Court of the United States, "would be a payment without the shadow of consideration; and no court of equity is believed ever to have sanctioned such a principle."*

For a mutual mistake as to the title of the vendor is ground for relief.†

And it is now well settled that mistake is as good a ground for relief in equity as fraud.‡

And in a case of mutual or common mistake as to title, although there is no fraud, a court of equity will relieve.§

In *Ex parte James*, *In re Condon*, L. R., 9 Ch. Appeals, 614, where a party on the demand of trustees in bankruptcy paid over money which he had received on execution against the bankrupt under a mistake of law as to their right to the same (he supposing from the demand being made that they had a legal right to it), it was *held* that he was entitled to recover back the money.

For a court of equity can relieve against the consequences of a mistake of law as well as against mistakes in fact.||

Melish, L. J., in *Rogers v. Ingham*, L. R., 3 Ch. Div., 357, says:

"I think that no doubt," as was said by Lord Justice Turner, "this court has power (as I feel no doubt it has) to relieve against mistakes in law as well as against mistakes in fact; (1) that is to say, if there is any equitable ground which makes it under the particular facts of the case inequitable that the party who received the money should retain it."

And the right to relief at law on account of a misrepresentation of law, though innocently made, is as clear as if it were a misrepresentation of fact.

In *Gardner v. Bird*, 57 Barb., 227, 291, it is well said:

Where a party acting under a mistake of law or fact does acts which mislead the adverse party, he is estopped as well as if he was not acting under such mistake.

And it has been *held* in England upon mature consideration that a misrepresentation of the law, though innocently made, will

58; *Earl Beauchamp v. Winn*, L. R., 6 H. L., 223, 234; *Jones v. Clifford*, L. R., 3 Ch. Divis., 790-2; *King v. Doolittle*, 1 Head (Tenn.), 77, 86.

* *Allen v. Hammond*, 11 Pet., 71.

† *Flyne v. Campbell*, 6 Mon., 286; *Boulin v. Pollock*, 7 Mon., 26; *Smith v. Robertson*, 23 Ala., 312; *Irick v. Fulton*, 3 Gratt., 193.

‡ *Torrance v. Balton*, L. R., 14 Eq. Ca., 124, 132, 134; *Lord St. Leonards on Vendors and Purchasers*, 14th ed., 120; *Daniel v. Mitchell*, 1 Story R., 190.

§ *Jones v. Clifford*, L. R., 3 Chan. Divis., 779.

|| *Stone v. Godfrey*, 5 D. M. & G., 76; *Bullock v. Downes*, 9 H. L. C., 1; *In re Condon*, L. R., 9 Chan., 609; *Rogers v. Ingham*, L. R., 3 Ch. Div., 357.

form as valid a ground for avoiding a contract as though it were a misrepresentation of fact.*

At page 492 of the above authority, Chief Justice Jervis says :

Upon consideration I am of opinion that a plea alleging a failure of consideration may be supported as well by showing that the bill or note was obtained by a misrepresentation of law as by a misrepresentation of fact.

And the right of petitioner to relief is still more clear by the law of Louisiana.

The Civil Code of Louisiana, Article 1846, Voor. ed., p. 346, paragraph 3, declares that :

Error of law can never be alleged as the means of acquiring, though it may be invoked as the means of preventing loss, or of recovering what has been given or paid under such error.

We submit that under this express provision of the Louisiana code the petitioner would be entitled to relief even if there had been no mistake and no misrepresentation on the part of the government through its own court.

For the Federal government recognizes, in all its departments, the statutes of the several States, and the construction given to them by the State courts, as constituting rules of decision, except where the Constitution, treaties, and statutes of the United States otherwise expressly provide.†

It is therefore manifest that the Louisiana law alone must govern in this case.

For there is no such thing as a common law of the United States.

In *Wheaton v. Peters*, 8 Pet., 658, the court says :

It is clear there can be no common law of the United States. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution and laws of the Union. The common law can be made a part of our Federal system only by legislative adoption.

When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated.

There being then no common law of the United States and no such law in Louisiana, petitioner most unquestionably would be entitled to a return of his money under the above provisions of the Louisiana law, even if the error of law had been one of his own instead of the error of the court.

But there is another ground under the Louisiana law (and which, as we have just seen, must govern this case) which entitles

* *Southall v. Riggs*, and *Forman v. Wright*, 11 Com. Bench R., 481, 492-3.

† 3 Dall., 344; 6 Pet., 291; 13 Pet., 45; 7 How., 1; 11 How., 297; 12 How., 361; 20 How., 1; 22 How., 352; 4 Wall., 203; Rev. Stat. U. S., 136, sec. 721.

the memorialist to the relief sought, and that is that a purchaser at a judicial sale in Louisiana, who is subsequently evicted, is entitled to recover back the purchase price.

The Civil Code of Louisiana, Article 2621, page 473, Voor. ed., is as follows :

The purchaser evicted from property purchased under execution shall have his recourse for reimbursement against the debtor and creditor ; but upon the judgment obtained jointly for that purpose, the purchaser shall first take execution against the debtor, and upon the return of such execution no property found, then he shall be at liberty to take out execution against the creditor.

In Louisiana there is also an implied *warranty* by law in all sales, judicial as well as conventional.

The law imposes and attaches a *warranty* as a consequence to every sale or contract without any stipulation to that effect.*

In *Clark v. O'Neal*, 13 Louisiana Annual Report, 381, the court says : " The seller is bound to deliver and warrant the thing which he sells."† The warranty respects the buyer's peaceable possession of the thing sold,‡ and the vendor warrants the buyer against the eviction of the whole or a part of the same.§

And this is the legal consequence of the sale even if there be no stipulation respecting the warranty.||

And this rule is as applicable to *judicial* as conventional sales. The adjudication of property in *judicial* sales in Louisiana imports full legal warranty without any stipulation to that effect.¶

At page 139 of the above case the court says :

The adjudication of the property to the defendant at the probate sale imported full legal warranty.

Even knowledge of the danger of eviction on the part of a purchaser at a *judicial* sale does not affect his right to relief as to the price, as an ordinary purchaser, when there is a deficiency of quantity in the thing sold.

That right, says the court in *Hass v. Neville*, 3 Louisiana Annual Report, 327, exists even when there was knowledge on the part of the buyer, unless excluded by a stipulation of non-warranty, and where the purchaser has expressly bought at his own risk and peril.**

In *Scott v. Teatherstone*,†† the court, in answer to the objections that the purchaser at a judicial sale was aware of the dangers

* 13 Louisiana Annual Report, 381; 7 Ib., 561; 9 Ib., 297.

† C. C., 2450.

‡ C. C., 2451.

§ C. C., 2477.

|| Civil Code, art. 2501 (2477), Voor. ed., 9 Louisiana Annual Report, 295, 297.

¶ *Gautreaux v. Boote*, 10 Louisiana Annual Report, 137.

** See C. C., 2481, 1960.

†† 5 Louisiana Annual Report, 314.

of eviction when he purchased (the property being then in litigation), and that he therefore took the risk and was not entitled to warranty and a return of the price, said :

To these propositions we cannot assent. The sheriff's sale to Collier is in the usual form, and carries with it, of course, the usual warranties of such instruments. The knowledge which purchasers have of the danger of eviction does not deprive them of the right of claiming the return of the price after the eviction has taken place. The right exists in all cases unless the party evicted, knowing the danger of eviction, took the property without warranty and at his peril and risk.*

And this rule is founded on the express provisions of the Civil Code, article 2505 (2481), Voor. ed., "*and on the moral maxim of the law† that no one ought to enrich himself at the expense of another.*"

It is therefore seen that, by the Louisiana law, and which must govern this case, the memorialist is clearly entitled to a return of the purchase price, even if the property had not been sold free of mortgage, and even if there had been no express warranty in the deed.

But there is still another ground which demonstrates the right of petitioner to a return of his money, which the government obtained without any equivalent or consideration, and that is, that the government, by accepting the money and covering the same into the treasury, ratified and adopted the representations and acts of its agents and officers in selling the property free of mortgage and warranting the title. For certainly if a party sells property to another with a representation that he sells it free of mortgage and warrants the title, he is bound to return the purchase price when the title fails.

The marshal who made the sale was the agent of the United States for that purpose, and the United States ratified it by accepting the proceeds thereof. Now "where the principal ratifies a sale made by the agent, by receiving the fruits, he is thereby bound by the agent's representations."‡

If a principal accept, receive, and hold the proceeds or beneficial results of a contract, he will be estopped from denying an original authority, or a ratification.§

* C. C., 2481; C. P., 711. † Civil Code, article 1965 (1960), Voor. ed.

‡ Wharton on Agency, § 174; Coneybeare v. New Brunswick Land Company, 9 H. Lds., 711; Boss v. Estates Investment Company, L. R., 3 Ch., 682; Central Railroad v. Kisch, L. R., 1 H. of Lds., 89; Oakes v. Tarquard, L. R., 2 H. L., 325; Doggett v. Emerson, 3 Story, 700; Kibbe v. Hamilton Insurance Company, 11 Gray, 163.

§ Bolton v. Hillersden, 2 Ld. Raym., 224; Thorald v. Smith, 11 Mod., 72; Byrne v. Doughty, 13 Ga., 46; Johnson v. Smith, 21 Conn., 627.

Where the proceeds of a sale are taken, this is an adoption of the sale.*

And, an adoption of the agency in part is an adoption *in toto*, as the law does not permit a principal to adopt an agent's unauthorized act so far as it is beneficial and reject the residue. By adopting part he becomes bound by the whole.†

In *Veasie v. Williams*, 8 How., 134, 157, the court says:

If a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed *in statu quo*.

Whatever the previous authority of the agent, says Wilde, B., in *Udell v. Atherton*, 7 H. and Nov., 172, whatever the principal's own innocence, he must, as it seems to me, adopt the whole contract, including the statements and representations which induced it, or repudiate the contract altogether.

Wherever an agent makes a contract on behalf of his principal, whether with or without authority, the principal cannot approbate and reprobate the contract. He must adopt it altogether or not at all; he cannot at the same time take the benefit which it confers and repudiate the obligation which it imposes.‡

The government cannot, therefore, either at law or in equity, be heard to say that its officers and agents had no legal right or authority to sell the property free of mortgage and with warranty. It is estopped to deny the authority and warranty by the receipt of the price. By accepting the proceeds of the sale, it became as fully bound for all the acts and representations of its officers, in consummating the sale, as if it had *previously* and *expressly* authorized the acts and representations to be made. The receipt of the money was an adoption of all the acts and means used in procuring it; for the government, no more than an individual, can take the proceeds and benefit of an unauthorized transaction without making itself liable for all the acts and misrepresentations by which the money was obtained, because the receipt of the proceeds of an unauthorized transaction is, according to all the authorities, a *full ratification and adoption* of all the means used, and of all the instruments employed, and of all the misrepresentations made in consummating the transaction.

The government is, therefore, in law, as well as in equity, bound to return the purchaser his money, as the same was obtained without consideration, and on representations and a *warranty* of title which have failed. For the government to keep money obtained without consideration, and on representations and a warranty which have failed, would be *intolerable injustice*.

And as petitioner took nothing by his purchase, and the gov-

* *Brewer v. Sparrow*, 7 B. and C., 310; *Byrne v. Morris*, 4 Tyr., 485.

† 1 Comst., 433; 10 N. Y., 335; *Story*, Agency, sec. 250; 33 Barb., 610; 34 N. Y., 30, 88; 38 Barb., 534; 8 Pick., 56; 19 Pick., 300; 23 Vermont, 565; 13 New Hampshire, 145.

‡ *Bristowe v. Whitmore*, 9 House of Lords C., 391, per Lord Kingsdown.

ernment parted with nothing of any value, it would be *illegal, inequitable*, and unconscientious for the government to keep money thus wrongfully obtained.

In the case of Daniel Stewart, Congress provided by act, in 1823, for refunding money paid by him to the United States for land, the title to which had failed, with interest at the rate of 6 per cent. per annum, from January 29, 1814 (the time of payment), until paid.*

So in 1832, an Act of Congress, directed the accounting officers of the Treasury to refund Hartwell Vicks money paid by him to the United States for a tract of land which was found not to be the property of the government, with interest at 6 per cent. per annum, from the time of its payment, May 23, 1818, until paid.†

And in 1859 the Secretary of War was authorized by act of Congress to pay to Thomas Laurent, surviving partner, etc., the sum of \$15,000, with interest on the same at the rate of 6 per cent. per annum, from the 11th November, 1847, "being the amount paid by the same firm on that day to Major-General Winfield Scott, in the city of Mexico, for the purchase of a house in said city, out of the possession of which they were since ousted by the Mexican authorities."‡

On the score of precedent, then, as well as law, equity, and justice, petitioner is, we think, entitled to have the purchase-money (\$5400) which he paid to the United States for the property from which he has been evicted refunded, but without interest, and for this purpose we report the accompanying bill and recommend its passage.

And the following points and citations appear in the House Report:

A good and valid title, then, and which means a title that is good against all claimants,§ was *most unquestionably* what was *held out* as intended to be sold and conveyed, and not merely such title as the government might happen to have. For it was the *thing itself* which had been seized and condemned as forfeited to the United States that the court was authorized to sell as it might see fit, so as to vest a good and valid title in the purchaser.

When the government sold the property it sold it as its own—as property which had, in the language of the statute, "become the property of the United States"—and not as property in which any one else had any interest or concern.||

* 6 U. S. Stat., 286.

† 6 U. S. Stat., 523.

‡ U. S. Stat.

§ 6 Exch. R., 873.

|| *Semmes v. The United States*, 1 Otto, 26; *Confiscation Cases*, 20 Wall., 112-113.

The sale, then, was in no respect like an ordinary judicial sale, in which as there has been no adjudication respecting the title, and it is therefore not known what the title is, only such title and interest as the party may happen to have is sold.

But the sale was an *extraordinary statutory* sale by the government, through its own court, of an *adjudicated* title and interest in and to *specific* property which it claimed and represented to be its own, and as free from mortgage.

And not only was the property sold as the property of the government, and as free from mortgage, but the marshal, *under the order of the court*, which had a general discretion and authority in the matter, actually caused the mortgage to be erased and cancelled, and produced and embodied in and annexed to the deed given to the purchaser a *certificate* from the record of mortgages, *showing the erasure* of the mortgage which was afterwards enforced against the property. This certificate, therefore, constituted an essential part of the deed, and was a *representation* and a *guarantee* that the mortgage had been *legally* cancelled and was no longer a subsisting lien upon the property, and this representation and guarantee the government is bound to make good by returning the money, as no court of equity has ever allowed a party to retain any benefit which he has received *through* a representation by himself or another which has turned out to be untrue.*

And this rule and principle is as applicable to judicial as to private sales.

In Roer on *Judicial Sales*, 77, sec. 175, 2r'd, it is said :

But although sales, whether judicial or on execution, are made subject to the doctrine of *caveat emptor*, yet if misrepresentation be made by the person selling and be relied on by the buyer to the injury of the latter, the sale will be set aside, and the money will be restored, if not already paid over.

And all the authorities hold that where a purchaser at a sheriff's or master's sale is *mised* by the representations, statements, or acts of the *officer or party* conducting the sale, as to the *incumbrances* on or the quantity or quality of the property sold, he will be relieved from his purchase; the sale, *even after confirmation*, will be set aside, and the purchaser will recover back any payment or deposit he may have made.†

In *Horton v. Moyers*, 25 Ga., 89, where the purchaser was

* *Rawlins v. Wickham*, 3 De Gex and J., 304; *Smith v. Richards*, 13 Pet., 36, 38; *Veazie v. Williams*, 8 How., 157.

† *Preston v. Frye*, 38 Md. R., 222; *Lawrence v. Cornell*, 4 J. Ch., 542; *Finley's Executors v. McCulley's Administrators*, 2 Phila., 212; *Horton v. Moyers*, 25 Ga., 89; *Light v. Pell*, 1 Edw. Ch., 577; *Morris v. Mowat*, 2 Paige, 586; *Anderson v. Foulke*, 2 Har. & G., 357-9; *Lefever v. Laraway*, 22 Barb., 167; *Brown v. Gilmer*, 8 Md., 322; *Strong v. Colton*, 1 Wis., 471.

misled and induced to purchase by the sheriff's proclamation that the property was sold to pay the purchase-money, and which was understood to mean to satisfy the vendor's lien, and that the title would therefore be good, but which turned out to be a *mistake*, it was *held* that the *equity* of the case was to rescind the sale at the instance of the purchaser.

So in *Finley's Executor v. McCulley's Administrator*, 2 Phila. R., 212, where the sheriff announced that he knew the property well, and that it was entirely clear of all incumbrance, except such as would be removed by the sale, but which turned out to be a mistake, it was *held* that the purchaser, who was misled by the sheriff's statement, though honestly made, could not be held bound by a bid so obtained.

In *Light v. Pell*, 1 Edw. Ch., 577, where, at a master's sale, the auctioneer, after reading the advertisement, said he would read a memorandum, which was not official, and which described the property as of greater dimensions than it turned out to be by several feet, the sale was set aside at the instance of the purchaser, who was *misled* by the reading of the memorandum.

In *Preston v. Frye*, 38 Md. R., 222, where a trustee sold property under a decree representing the title to be good, but which the purchaser afterwards discovered was defective, the court, even after the final ratification of the sale, annulled the sale and ordered the purchase-money to be refunded.

And in *Lawrence v. Cornell*, 4 John. Ch., 542, where an officer sold property, representing that the same was free of mortgage, when it was not, Chancellor Kent ordered that the incumbrances should be removed by the application of so much of the proceeds of the sale as might be necessary for that purpose, so as to make good to the purchaser an unincumbered estate, according to the terms of his purchase.

Much more, then, must a purchaser be entitled to relief when the property is sold, in accordance with the order of the court, as free from mortgage, but which turns out to be a mistake.

And a misrepresentation of law, as well as a misrepresentation of fact, entitles the parties *misled* to full relief in equity.*

And where the mistake of law is mutual, but attributable to the agent of the party seeking to take advantage of it, equity will relieve.†

In *Griffith v. Townley*, 69 Mo., 13, where an administrator sold lands of his intestate, under an order of court, supposing

* *Wheeler v. Smith*, 9 How., 55; *Jordan v. Stevens*, 51 Me., 83; *Evarts v. Strodes's Administrator*, 11 Ohio, 488; *Snyder v. May*, 7 Harris, 238; *Brown v. Rice's Administrator*, 26 Gratt., 470-471; *Drew v. Clark*, Cook., 380; *Cooper v. Pibbs*, L. R., 2 H. L., 149; *Week's Appeal*, 20 P. F. Smith, 425; *Fane v. Fane*, L. R., 20 Eq. Ca., 698.

† *Snell v. Ins. Co.*, 8 Otto, 91; *Griffith v. Townley*, 69 Mo., 21; *Green v. Morris*, etc., 1 Beas., 165; *Woodbury v. Charter Oak Ins. Co.*, 31 Conn., 517; *Longhurst v. Star Ins. Co.*, 19 Iowa, 364.

and representing that it was the fee he was selling, and the purchaser supposed it was the fee he was buying, but it turned out that nothing passed by the sale but the equity of redemption, *Held*, that this was such a case of mixed and mutual mistake of law and fact as entitled the purchaser to relief in equity.

At pages 20-1 of the above case the court says:

The parties bargained for the fee, and there was, under the administration proceedings, no fee for sale. The subject-matter of their contract had, in legal contemplation, no more existence than if it had been a dwelling already consumed by fire, or a message already swept away by a flood. Both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract. It constituted, therefore, the very essence and condition of the obligation of their contract.*

To refuse relief in such a case, then, said the court—

Would be to permit one party to take an unconscientious advantage of the other, and to derive a benefit from the contract which neither of them intended it should produce.†

And where a purchaser will not obtain such a title as he supposed from the terms of sale he would, as where the property is sold free from incumbrance, and the title to be in fee, the purchaser will be relieved from his purchase.‡

And in *Snell v. Ins. Co.*, 8 Otto, 91, where relief was granted on account of a mistake as to the legal sufficiency of the policy to include what was the understanding of the parties, but which the agent of the company assured the party was the legal and proper form to include and embrace their understanding, the court said :

A court of equity could not deny relief under such circumstances without aiding the insurance company to obtain an unconscionable advantage through a mistake for which its agents were chiefly responsible.

So, in this case, relief cannot be refused without aiding the government to take an unconscientious advantage, obtained through a *mistake* for which its agents were alone responsible.

For the government undoubtedly supposed it was selling, and the purchaser unquestionably supposed he was purchasing, an unincumbered estate, and which the government by its acts and proceedings led him to believe it owned, and that he would acquire by his purchase.

But the estate and interest intended to be sold, and which it was expected would be conveyed, had no *legal existence* under the

* 1 Story Eq. Jur., § 142.

† *Griffith v. Townley*, 69 Mo., 19; *Champhie v. Layton*, 1 Edw. Ch., 467.

‡ *Post v. Leet*, 8 Paige, 337; *Seaman v. Hicks*, *Ibid.*, 656-658.

confiscation proceedings, and the government, in consequence thereof, was unable to convey to the purchaser the right and title on account of which it received, and for which the purchaser was induced to pay, his money.

The government, therefore, undertook to sell something when really it had nothing to sell. The *thing* intended to be sold and bought did *not* exist, as the parties supposed, and where that is the case the sale, whether a judicial or a private one, fails of effect for want of the thing, as a party is entitled to have, and cannot be "compelled to accept anything less than he bargained for."*

And the well-settled rule is, that money paid for a title or thing which did not exist at the time of the contract, as the parties supposed, may be recovered back, *as paid without consideration*, even though there be warranty in the conveyance.†

For "a vendor" (says the Supreme Court of the United States) "is bound to know that he actually has that which he professes to sell."‡

"A court of equity" (said Chief Justice Marshall, in *Garnett v. Macon*, 2 Brock., 185) "considers a vendor responsible for the title he sells, and is bound to inform himself of its defects," and to make the same known to the purchaser, as the latter has a right, if no liens or incumbrances are made known to him by the vendor, to suppose himself as purchasing an estate free from incumbrance.

Where a vendor intends to sell, and the vendee to purchase, a subsisting title, but which in fact *does not exist*, a payment of the purchase-money (says the Supreme Court of the United States) "would be a payment without the shadow of consideration, and no court of equity is believed ever to have sanctioned such a principle."§

For it is a *legal fraud* for a party, even through *honest* mistake, to represent that he has that which he does not own, and to sell and convey the same as his, and a purchaser, who relies on and is misled by the representation, is entitled to be fully relieved and indemnified as to all the consequences of the purchase.||

* *Smyth v. McCool*, 22 Hun., 597; *Ingersoll v. Jones*, 84 N. Y., 622; *McGorren v. Avery*, 37 Mich., 120; *Arnold v. Arnold*, 14 Ch. D., 279-81; *Jones v. Rimmer*, 14 Ch. D., 588; *Martin v. McCormick*, 4 Seld., 331; *Hitchcock v. Giddings*, 4 Price, 135; *Gardiner v. Mayor*, 26 Barb., 423; *Couturie v. Hastie*, 5 H. L. Ca., 673; *Light v. Pell*, 1 Edw. Ch., 578.

† *Gardiner v. Mayor*, etc., 26 Barb., 423; *Hitchcock v. Giddings*, 4 Price, 135; *Martin v. McCormick*, 4 Seld., 331; *McGorren v. Avery*, 37 Mich., 121-2; *Strickland v. Turner*, 7 Exch., 208; *Sinking Fund Com. v. N. Bank Ky.*, 1 Met. (Ky.) R., 192-4.

‡ *Allen v. Hammond*, 11 Pet., 72.

§ *Allen v. Hammond*, 11 Pet., 72; *Bowling v. Pollock*, 7 Mon., 32.

|| *Hart v. Swaine*, Law Rep., 7 Chan. Div., 42; *Bower v. Penn*, 90 Penn. St., 362; *Brownlie v. Campbell*, 2 L. R., 5 App'ls Ca., 957; *Smith v. J. Richards*, 13 Pet., 38.

For *mistake* is as good ground for relief in equity as fraud.*

In *Gardiner v. The Mayor, etc.*, 26 Barb., 423, where a municipal corporation had undertaken, by means of an assessment and sale, to create in themselves a certain term or interest in land, and, supposing that they had succeeded in doing so, they sold such term or interest to the plaintiff, and it afterwards turned out that owing to a defect in the proceedings no such term or interest was ever created: *Held*, that an action would lie in favor of the plaintiff to recover back the purchase price, even though there was no covenant of warranty and no fraud, not on the ground of a failure of title, but because the thing purchased, contrary to the supposition of both parties, never had any legal existence.

At pages 427, 428-9, of the above case, the court says:

The defendants undertook to sell something when really they had nothing to sell. The thing intended to be sold had no existence, and when that is the case there can be no contract of sale.†

The defendants intended to sell, and the plaintiff intended to purchase an interest in the land, which, in fact, did not exist. It now appears that the parties were equally mistaken. The assessment and sale were invalid, and the defendants had no interest at all in the premises. The plaintiff purchased and paid his money under the mistaken belief that he was acquiring thereby a valid interest in the land. The parties being thus mistaken in relation to the very existence of the thing, in respect to which they contracted, "the business," says Fonblanque, "is null in itself by the general rules of contracting," and the consideration should be refunded.‡

In *Sinking Fund Commissioners v. National Bank of Kentucky*, 1 Met. (Ky.), 192-4, where the State had sold and conveyed by *legislative act*, but without any covenant of warranty, certain real property *as unincumbered*, but which turned out, contrary to the supposition of both parties, to be subject to a mortgage, the court well and forcibly says:

There is no implied warranty of title on the sale of real estate, but that rule does not dispense with the exercise of good faith in such cases, nor does it nullify or affect in any degree the equitable doctrine which requires the correction of a mutual mistake that operates prejudicially to one of the parties. Nor does it diminish the force of the principle by which the vendor is regarded in every sale as coming under an implied undertaking to his vendee that he has a right to make sale of the thing which he attempts to transfer to him.

The general doctrine is, that a vendor undertakes that he is the owner of that which he assumes to sell. Not that his title to the real estate, which is the subject of the sale, is the paramount title, but that the title which he claims belongs to him, and not to any other person. Good faith requires the application of this doctrine to all sales.

* *Snell v. Ins. Co.*, 8 Otto, 89-92; *Gillespie v. Moon*, 2 J. Ch., 585; *Daniel v. Mitchell*, 1 Story's R., 190; *Torrence v. Bolton*, L. R., 14 Eq. Ca., 124, 132, 136; *Stapylton v. Scott*, 13 Ves., 425; *Jones v. Clifford*, 3 Ch. D., 792; *Brownlie v. Campbell*, L. R., 5 App'l's Ca., 958.

† See 2 Kent's Com., 468; 1 Story's Eq. Jur., §§ 142-3.

‡ Fonb. Eq., 4th Am. ed., 109.

The State assumed to sell her title to the railroad companies as if no incumbrances existed upon it, and consequently good faith requires that she should make good that which she undertook to sell. Or if all the parties to that transaction acted under the erroneous belief that the city of Louisville had no available lien upon the road, this mutual mistake ought not to be allowed to prejudice the purchaser.

Every principle of equity and justice, then, requires that the government should refund the money received through *mistake* without consideration, and for property which it did not own and had no right to sell.

But another conclusive reason which entitles claimant to his money is the *express* covenant of warranty in the deed. Deed says: "To have and to hold the above-described property," etc., "unto the said L. Madison Day, his heirs," etc., "to his and their proper use, benefit, and behoof forever." This is an absolute warranty, as no particular form of words is necessary to constitute a warranty.*

And if the warranty was made by *mistake* and without authority, the government has adopted, and ratified the warranty by accepting the purchase price.†

In *Brown v. United States*, 6 Court of Claims, 198-9, the court says:

The government is not liable, like the ordinary principal, for the negligence and mistakes of its agents, and their authority is limited and defined by law, and the law is notice to all the world. But that defence cannot prevail where the government adopts and ratifies the mistake, or receives and accepts the benefit of the unauthorized act.

The government, then, having *adopted* and ratified the acts of its agents in selling the property free of mortgage by accepting the proceeds of the sale, is *estopped* from denying their authority to make the sale in the way and manner they did.

For the law will not permit a party to take the fruits of an unauthorized transaction and then repudiate the obligation which the transaction imposes.‡

But the government is not only estopped to deny the warranty by the acceptance and receipt of the price, but is also bound because the *court had a general discretion and authority under the act* to direct such deeds to be executed and delivered as should *vest good and valid titles* in the purchasers.§

* *Newcomb v. Presby*, 8 Met., 410; Chit. on Cont., 643, 11th ed.; 11 How., 322-3, 325.

† *Brown v. United States*, 6 Court Claims, 171, 198-9; *Veazie v. Williams*, 8 How., 134, 157; *Elwell v. Chamberlin*, 31 N. Y., 619; *Oaks v. Turquand*, L. R., 2 H. L., 325; *Doggett v. Emerson*, 3 Story, 700; *Hibbe v. Hamilton Ins. Co.* 11 Gray, 163.

‡ *Veazie v. Williams*, 8 How., 157; *Bristowe v. Whitmore*, 9 H. L. Ca., 391; *Melbourn v. Brougham*, L. R., 4 Appl. Ca., 169.

§ 12 U. S. Stat., 591, secs. 7 and 8.

And says the Court of Claims:

Where a statute confides a discretion to an officer, a party dealing with him in good faith may assume that the discretion is properly exercised.*

For the validity of the act does not depend upon its being a wise exercise of discretion, but upon the fact that the party had the right to exercise this discretion.†

And where a sale is made under the order and discretion of a court, a purchaser has a right to consider that the title has been investigated with more than ordinary care, and if there is anything in the terms and particulars of sale at all calculated to *mislead* the purchaser, he will be relieved from his purchase, even if the court should be of opinion that he ought not to have made a mistake.‡

In *Arnold v. Arnold*, L. R., 14 Ch. Div., 283 and 281, it is well and forcibly said:

If a man makes a description calculated to mislead, I do not think it is well for him to say, "If you had been very careful you would have found out the blunder." How was it he did not himself find it out? How can the vendors be heard to say that the purchaser ought to have found out for them that very blunder which they never found out for themselves?

But I consider that if there is anything at all done wrong under the sanction of the court, the court ought not only not allow the purchaser to be damaged, but ought to treat him with more liberality than in the case of ordinary sales. . . . And the reason is obvious. People buying an estate put up for sale under the chancery division believe that everything has been more carefully investigated than it would be by an ordinary vendor.

And in *Broad v. Munton*, L. R., 12 Ch. Div., 150, Lord Justice Cotton says:

Where a sale is by the court . . . the purchaser has a right to assume that the court will take very good care that there shall be nothing that can in any way mislead him as to the title he is getting.

Most unquestionably, then, the purchaser had an undoubted right to assume that the court had taken very good care that there was nothing in its acts and proceedings which could, by possibility, *mislead* him as to the title he was getting and which it assumed to sell.

In *Cumming's Appeal*, 11 Harris (23 Penn. St.), 313-315, where a party purchased property at a judicial sale, under a misapprehension caused by a decision of the highest State court that

* *McKee v. United States*, 12 Court Claims, 527-8; *Thompson's Case*, 9 ib., 187-196.

† *United States v. Speed*, 8 Wall., 83.

‡ *Arnold v. Arnold*, L. R., 14 Ch. Div., 273, 277; *Jones v. Bimmer*, L. R., 14 ib., 592; *Broad v. Munton*, L. R., 12 ib., 150.

incumbrances would be discharged and removed by the sale, Lewis, J., well says:

Common justice demands that legal proceedings should not be made a snare for innocent citizens who repose confidence in them.

As a general rule, ignorance of the law is no ground for relief from the obligations of a contract. But where the contract is made in some sort with the courts themselves and where the highest of these tribunals has actually represented that the purchaser, under circumstances like those existing in this case, would take the land discharged of incumbrances, either that representation ought to be carried out, or the purchaser, acting on the faith of it, should be relieved.

But the confiscation proceedings and sale being *null* and *void*, *caveat emptor* is not applicable (even if recognized and of force), because "the judgment and execution being void, would pass no title," and the "vendee might resist an action for the purchase-money by showing that no contract of sale could grow out of that which was in law a nullity."*

And it has also been *held for a long time and in many cases* that money paid under a void judgment or execution may be recovered back *on the ground of a failure or want of consideration*.†

For it is well settled that a purchaser at a judicial sale, *as far as respects his right to recover his money back*, does not take the risk of there being an authority to sell, and is not bound to inquire into the sufficiency of the proceedings to authorize the sale at the risk of losing his money.

On the contrary, when the proper officers offer to sell land for taxes or on execution, he may assume that they have authority, and if they have not may recover his money.‡

For the plaintiff or party for whose benefit the property is sold is responsible to the purchaser for the sufficiency of the proceedings to authorize the sale, and pass the particular interest or property intended to be sold.§

* Commissioners v. Watts, 10 Watts, 392-3; Bramfield v. Dyer, 7 Bush., 505, 508; Darwin v. Halfeld, 4 Sandf. Su. Ct., 468; Shirley's Administrator v. Jones, 6 B. Mon., 275; McGee v. Wathis, 57 Miss., 638.

† Newdigate v. Davy, 1 Ld. Raym., 742; Chapman v. City of Brooklyn, 40 N. Y., 372; Schwinger v. Hickok, 53 N. Y., 285; McGorren v. Avery, 37 Mich., 121-2; Norton v. Rock Co., 13 Wis., 684-6, 697; Henderson v. Overton, 2 Yerg., 394; Sands v. Lynham, 27 Gratt., 291, 304; Earl v. Bickford, 6 Allen, 549, 550; Bunson v. Grant, 49 Ga., 394; Williams v. Martin, 38 Me., 47, 51; Dowel v. Goode, 25 Ohio St., 390.

‡ Norton v. Rock Co., 13 Wis., 611; McGorren v. Avery, 37 Mich., 120; Chapman v. The City of Brooklyn, 40 N. Y., 372; Neal v. Read, 7 Baxter, 338-9; Dowel v. Goode, 25 Ohio St., 390, and the foregoing authorities.

§ McGovern v. Avery, 37 Mich., 120; Miller v. Palmer, 55 Miss., 337; Gardiner v. Mayor, etc., 26 Barb., 426-7.

In *Chapman v. The City of Brooklyn*, 40 N. Y., 372, where a party purchased land sold for taxes, under void proceedings, it was *held*, that the purchaser could recover back the purchase price from the city.

The court in the above case says:

In ordinary cases the circumstances established in this action would be sufficient to entitle the plaintiff to recover the money with interest, for the consideration has entirely failed. The defendant supposed its own proceedings had been regular, and that it was consequently entitled to sell the land in question for the payment of the assessment made upon it, and under the same impression the lots were bid off by the purchaser. . . . In fact, the city had no power to sell or in any manner affect or encumber the land in favor of the purchaser. It was unable to give him for his money the right on account of which it received it. . . .

The money in controversy, both legally and equitably, belongs to the plaintiff, and it would not be creditable to an enlightened administration of the laws to turn him out of court without it.

In *Sands v. Lynham*, 27 Gratt., 291, 304, it was held that a purchaser under a void decree is not only entitled to a return of the purchase price, but is subrogated to the creditor's rights against the property where the money had discharged a lien on the land.

In Tennessee it has uniformly been *held* that *caveat emptor* does not apply to a sale under a void judgment, and that a purchaser, in such a case, could recover back the purchase price from the plaintiff in execution, even though the whole amount had not been paid over to him.*

In *Bell v. Craig*, 52 Ala., 215, the court says:

If the sale was void the purchase-money was not assets in the hands of the administrator-in-chief.† It belonged *ex equo et bono* to the purchaser. Neither the administrator *de bonis non*, nor the creditors or heirs of the intestate had claim or right to it.

And in *Bland v. Bowie*, 53 Ala., 152, 162, it is pointedly said:

We do not doubt that it is competent for the purchaser, at any time after he discovers that the proceedings for the sale are void, to resort to a court of equity to compel the heir or devisee to elect a ratification or the rescission of the contract of purchase. If the purchase-money has been paid and distributed to the heirs, or applied by a personal representative to the payment of debts, a court of equity would compel a conveyance of title from the heirs, if they could not successfully impeach the fairness of the sale.‡

In *Dowel v. Goode*, 25 Ohio St., 390, a sale under a decree which was void for want of jurisdiction in the court was set aside, on motion, and the money restored to the purchaser.

* *Henderson v. Overton*, 2 Yerg., 394; *Neal v. Read*, 7 Baxter, 338-9.

† *Petit v. Petit*, 32 Ala., 288.

‡ *Bell v. Craig*, 52 Ala., 215.

And in *Norton v. Rock Co.*, 13 Wis., 611, it was *held* that where a tax sale was void the purchaser could recover back the amount paid, with interest, from the county.

In *McGorren v. Avery*, 37 Mich., 120, it was *held* that money paid for a certificate of execution sale under a void judgment could be recovered back.

The court in the above case says :

The defence is, that although the certificate was void as based on no judgment, yet the purchaser was bound to look to the judgment himself, and bought at his own risk.

There is certainly much ground for holding that in most cases where individuals purchase at judicial sales they do so at their own risk of the regularity of the title.

But there are cases in which it has been recognized by the courts that money paid under a mutual mistake for that which had no legal existence or validity may be recovered back as paid without consideration, and it seems to us that the present case comes within the rule as laid down in *Martin v. McCormick*, 4 Selden, 331, and supported by other authorities there cited.

It was the sale of non-existing right by parties who were to a certain extent responsible as representing the persons who caused the mistake by originating the void process. The case does not rest on fraud or misrepresentation, but on a mistake as to the existence of the substantial right bargained for.

And in *Brumfield v. Dyer*, 7 Bush., 505, in which it was held that equity would enjoin the collection of a bond given by a purchaser at a sale under a void judgment, it is well and pointedly said :

The court having no jurisdiction, the judgment and the sale made in pursuance to the same were of necessity void. The purchaser at said sale took nothing under the purchase. The bonds enjoined in this proceeding were founded upon no consideration, and in equity and good conscience ought not to be collected from the purchaser.

But even if the sale had been an ordinary judicial instead of a void statutory sale of an adjudicated title to specific property, claimant would, under any rule of law, be entitled to a return of his money, as the government was *alone instrumental* in causing the seizure, condemnation, and sale of the property.

For it is well settled by an irresistible current of authority that where plaintiff in execution is in any way *instrumental* in causing the seizure and sale of property which does not belong to the defendant, but to a stranger who recovers it from the purchaser, the purchaser can recover his money back from the plaintiff in execution, "upon the principle," as stated by the courts, "that he has parted with his money, through the agency of the plaintiff, for a consideration which has failed."*

* *Sanders v. Hamilton*, 3 Dana, 550; *Bartholomew v. Warner*, 32 Conn., 98; *Hackley's Executors v. Swigert*, 5 B. Mon., 88; *Brumell v. Hurt*, 3 J. J. Mar., 709; *Hanna v. Guy*, 3 Bush., 93; *Wolford v. Phelps*, 2 J. J. Mar., 35; *Bartlett v. London*, 7 J. J. Mar., 641; *Brumfield v. Dyer*, 7 Bush., 505.

In *Sanders v. Hamilton*, 3 Dana, 550, the court in an elaborate and well-considered opinion says:

If a plaintiff in execution has been instrumental in causing the property of a stranger to be sold, we can see no principle of reason or of law that would exonerate him from responsibility to the purchaser.

The exhibition and sale of property by an individual, as his own, is regarded by law as sufficient to make him a warrantor of the title; and we can see no principle which would exempt him from liability when he has been instrumental in effecting the same object by color of an execution. He is guilty of the same wrong, and has been instrumental in practicing the same delusion upon the purchaser in the one case as in the other. And it can be no justification or palliation of his wrong that he has accomplished his object by color of an execution. His execution affords him no warrant to levy upon the property of a stranger; and if he does it, or procures it to be done, he is guilty of an *abuse* of the process of the court, which cannot sanctify the deed or place him on a better ground than if he sold, or procured the sale to be made without such authority.

It is, then, upon the principle that he has parted with his money through the agency of the plaintiff for a consideration which has failed, that he has a right to his action.

And in *Wolford v. Phelps*, 2 J. J. Mar., 35, the court well says:

If the plaintiff points out and shows land, he holds out to the world that the land on which he directs his execution to be levied is subject to the payment of his debt. If he has been instrumental in causing land to be sold by the sheriff, when the defendant in the execution had no interest in it, he has no just cause of complaint when a purchaser resists the payment. It was the plaintiff's fault to endeavor to make his debt of property not owned by his debtor, and can only be regarded as a fraud on the rights of others.

We do not perceive any insuperable reason founded in public policy, we know of no express adjudication, and we cannot find any principle of morality which prohibits a purchaser at sheriff's sale from asking at the hands of the chancellor relief against a sale bond executed without consideration, through a fraud practiced upon him, or through mistake. Consequently, we shall not estop the complainant in this case by saying to him *caveat emptor*.

And in *Bartholomew v. Warner*, 32 Conn., 98, where the sheriff made a seizure, and hearing the property was mortgaged, demanded a bond of indemnity, which being given, he sold the property to a party who gave it up on the demand of the owner, and sued for his money, and the court after stating that the action was not in reality against the sheriff for misconduct, said:

Charity requires us to suppose that Arnold & Little would not have levied on this horse if they had not mistakenly supposed that it belonged to Roorback (the defendant). After they discovered the mistake they could not in common honesty take the money, and no one else but the plaintiff had any claim to it.

So, in this case, it is not to be supposed that the government would have caused the property to be seized, condemned, and

sold as *free and unincumbered*, if it had not *mistakenly* supposed it had a right to do so.

But after it has discovered its *mistake* it cannot, in common honesty, keep the money, which, *ex æquo et bono*, belongs to claimant.

For the government, like an individual, as is well said by the Supreme Court of the United States, must refund money received without consideration, and which, according to natural justice and equity, ought to be refunded.*

CHAPTER XII.

ESTOPPEL—EQUITABLE—LEGAL.

Equitable Estoppel.—Some writers have considered estoppel as a branch merely of the law of evidence, but this is a great mistake. It is the result of certain rules which determine and regulate primary rights of property and contract, and is therefore a part of the substantive law and a *rule of property*.

In other words, estoppels *determine the right*. This is so both as to *legal* and *equitable* estoppels. There is a difference in the facts from which an equitable estoppel may exist from that of the common-law estoppel, but the result is the same; it fixes the right of property. Thus the facts *in pais*, and instances of the *conduct* of a party which a court of equity holds as an *estoppel*, have the same effect as the common-law estoppel by *record*. In the first, the matter is shown by *parol*, the latter by writing. It is true that Lord Coke gives instances of estoppel *in pais* at common law, as “by livery, by entry, by acceptance of rent, by partition, and by acceptance of an estate.” Now these instances may be regarded as matters of estoppel at the present day by both courts of law and equity, yet the equitable doctrine of estoppel has been extended and expanded since Lord Coke’s time. And it is said that many of these rules, upon which this broad and

* United States v. State Bank, 6 Otto, 30.

just doctrine is based, were unknown to the law when Lord Coke wrote.*

The *harsh* definition of *estoppel* by Lord Coke has induced the student, practitioner, and judge quite often, to indulge the idea of *odium* against estoppels, for he says: "An estoppel is where a man is concluded by his own act or acceptance to say the truth." He added: "Touching estoppels, which are a curious and excellent sort of learning, it is to be observed that there are three kinds of estoppels, viz., by matter of record, by matter in writing, and by matter *in pais*." By writing he meant only a deed,—a writing under seal.

The instances he gives of *estoppel in pais* have just been mentioned. It is admitted that the original legal rules concerning estoppel were arbitrary, and sometimes very unjust; and to the present time these rules are, to a certain extent, technical and strict. But "equitable estoppel, in the modern sense, arises from the *conduct* of the party, using that word in its broadest meaning, as including his spoken or written words, his positive acts, and his silence or negative omission to do anything."† The same author adds: "Its foundation is justice and good conscience. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforced by other rules of law, unless prevented by the estoppel. The doctrine of equitable estoppel is pre-eminently a creature of equity."

The idea of the two kinds of estoppel has been well expressed by C. J. Perley, of New Hampshire, in the case of *Horn v. Cole*, *supra*. He says: "The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy a record is held to impart incontrovertible verity; and for the same reason a party is not permitted to contradict his solemn admissions by deed. And the same is equally true of legal estoppel by matter *in pais*. Legal estoppels exclude evidence of the truth, and the equity of the particular case to support a strict rule of law on grounds of public policy. Equitable estoppels are

* 2 Pomeroy Eq. Jur., 801-2; *Horn v. Cole*, 51 N. H., 287, as to the doctrine.

† 2 *Ibid.*, § 802.

admitted on the exactly opposite ground of promoting equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by *oral* evidence; and the evidence should, doubtless, be carefully scrutinized, and be full and satisfactory before it should be admitted to estop the party from showing the truth, *especially in cases affecting the title to land*. But, where the facts are clearly proved, the maxim that estoppels are odious—which was used in reference to legal estoppels, because they shut out the truth and justice of the case—ought not to be applied to these equitable estoppels, as it has sometimes been inadvertently, as I think, from a supposed analogy with legal estoppel by matter *in pais*, to which they have in this respect no resemblance whatever."

As the doctrine of estoppel, in its application to the *conduct* and *status* of parties in regard to all kinds of property, is so vast in extent, it is intended here to notice only a few general principles, and now and then an illustration in regard to the effects of estoppel upon *real property*. The chapter on "Notice" involves much of the doctrine of *equitable* estoppel, as well as *legal*. The idea of a party being bound by the "notice" of "recitals" in written instruments, by "*lis pendens*," "*possession*," "*acts and knowledge of agents*," and the "*registration of instruments*," involves the idea of estoppel on the party from taking advantage of his own wrong, or negligence, or fraud. And especially, under the doctrine of "*priorities*," these principles of equitable estoppel are most prominent.

The "*statutory notice*" of the registration of a deed has the effect frequently to estop the party from asserting his own title. It is an imperative estoppel which prevents a party from "*speaking the truth*," but sustained on reasons of public policy. Under the doctrine of an equitable estoppel a man may *forfeit the title to his land*. This, too, without a word of "*writing*,"—by *conduct* simply. Take this instance: A. is *owner* of land. He stands by and knowingly permits B. to expend money, and make improvements on the land under the innocent but mistaken assumption of a right to do so, and interposes no objection, asserts no

claim of title. A. is then estopped from setting up his title as against B.'s right to the improvements. This is clearly a right of property in B. In strictness A. has the whole title, and B. has no right of property, by the ordinary rules of law applicable in the absence of the estoppel. The estoppel *creates* a right in B., which is as much a right of property as though it had resulted from a conveyance, or from a statutory adverse possession. As will subsequently appear, at common law one mode of *acquiring title* was by estoppel, resulting from a covenant of warranty.* Thus, if one who knows he has title to land, at a public sale, when it is publicly requested that any person claiming the land, or an interest therein, to make *known a claim*, and *does not* do so, he is estopped from setting up a title to the land against the party purchasing, who was influenced by this silence.† Of course it must appear that the party thus remaining *silent intends* the party to act, or induces the party purchasing to *believe* he had no interest in the property.

Definition.—From what has been said, and from what will further appear, the definition of an equitable estoppel, given by Pomeroy, may be accepted as reasonably accurate, though slightly different in form from that often given by text-writers ; it is this: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might, perhaps, have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or remedy."‡

This definition ignores the idea that estoppel is a mere rule of evidence not affecting the real rights of the parties ; it incorporates the truth that the party estopped *loses*, and the party having

* Bigelow on Estoppel, and authorities cited under head, "Title by Estoppel."

† *Mason v. Williams*, 66 N. C., 564 ; *Sherill v. Sherill*, 73 N. C., 8 ; *Sanderson v. Ballance*, 2 Jones Eq. (N. C.), 322 ; *Miller v. The Land and Lumber Co.*, 66 N. C., 503 ; *Story Eq. Jur.*, vol. i., 385-6 ; *Hurd v. Kelly*, 78 N. Y., 588, 597 ; *Cloud v. Whiting*, 38 Ala., 57.

‡ 2 Pomeroy's Eq. Jur., § 804 (note 1).

the benefit of the estoppel *gains*, or obtains a *right*, which may be of *property*, of *contract*, or sometimes simply a remedy.

The same author then concludes that the following elements constitute the estoppel :

1. There must be conduct, acts, language, or silence, amounting to representation, or a concealment of material facts.

2. These facts must be known to the party estopped at the time of his said conduct ; or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him.

3. The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him.

4. The conduct must be done with the intention, or at least with the expectation, that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be acted upon.

5. The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it.

6. He must, in fact, act upon it in such a manner as to change his position for the worse ; in other words, he must so act that he would suffer a loss if he were compelled to surrender, or forego, or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it.*

It will be observed that, in the enumeration of the ingredients of an equitable estoppel, *fraud* is not given as an essential element. This definition and these ingredients more properly define the modern equitable estoppel, called estoppel by "*conduct*," in which it is said that if the element of *fraud* was considered *necessary* it would strike out some of the most familiar and best-established instances of equitable estoppel. It is true that a fraudulent design to mislead is often present in this *conduct* working an estoppel ; but this only renders the result more clearly just. The following has been said by an English court, in reference to what constitutes estoppel by *conduct* : "*If any*

* 2 Pomeroy's Eq. Jur., § 805 (note 1). And see the English case of *Freeman v. Cook*, 2 Exch., 654; citing and sustaining *Pickard v. Sears*, 6 A. & E., 469, 474.

person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement, or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference drawn from the words or conduct." In the leading case of *Pickard v. Sears*, *supra*, the facts were substantially these: A., the owner of chattels in B.'s possession, which were taken in execution by C., abstained from claiming them for several months, and conversed with C.'s attorney about them without mentioning his own claim, and thus impressed C. with the belief that the goods belonged to B. C. sold them; this was held sufficient to sustain the finding that A. was estopped.

This is estoppel by *conduct*. So it would seem that *fraud*, in its strict sense, is not necessary in estoppel by *conduct*. Except the meaning given to fraud be synonymous with "unconscientious" or "inequitable," as in the instance of the doctrine (in some States) of specific enforcement of verbal contracts for the sale of land when partly performed by the plaintiff, it is considered *fraudulent* for the defendant to contest his liability by setting up the statute of frauds after he had permitted the plaintiff, *without objection*, to go on and partly perform the parol contract. In this case, where fraud is mentioned, it does not mean *actual* fraud—a wilful deception—but simply that it is "unconscientious." So the attempt to *repudiate conduct* which had constituted the estoppel, might be described as *fraudulent*. In the note,* will appear the American leading cases in which the *conduct* of the party has been held an estoppel without the element of *fraud*.

In *Rice v. Bunce* the court of Missouri, while using the general expression that fraud is an essential element in equitable estoppel, explains by the argument that the "fraud" need not be

* *Continental Bank v. Bank of Commonwealth*, 50 N. Y., 575, opinion by Judge Folger; *Gaylord v. Van Loan*, 15 Wend., 308; *Blair v. Wait*, 69 N. Y., 113; 30 N. Y., 226; *Barnard v. Campbell*, 55 N. Y., 456; *Waring v. Sornborn*, 82 N. Y., 604; 798 N. Y., 588; 5 Denio, 154; *Bidwell v. Pittsburg*, 85 Penna. St., 412; *Stephens v. Bennett*, 51 N. H., 324; *Morgan v. Railroad Company*, 6 Otto, 716; *Holmes v. Crowell*, 73 N. C., 613-627; *Anderson v. Armstead*, 69 Ill., 452; *Clark v. Coolidge*, 8 Kans., 189; *Kuhl v. Mayor, etc.*, 23 N. J. Eq., (8 C. E. Green), 84; *Rice v. Bunce*, 49 Mo., 231; *McCabe v. Raney*, 32 Ind., 309; *Harshorn v. Potroff*, 89 Ill., 509; 33 Mich., 475.

an actual intent to deceive in the representation which creates the estoppel; the "fraud" may, and generally does, consist in the subsequent attempt to controvert the representation and to get rid of its effects, and thus to injure the one who had relied on it. Perhaps this explanation would apply to and show the real meaning of many of the cases in which the general formula is used that fraud is essential.

On the general doctrine I will only mention the facts held as an estoppel in a leading New York case, *Dezell v. Odell*,* namely: A sheriff levied on goods by execution against A., and delivered them to B., the latter giving a receipt promising to redeliver them to the sheriff by a certain day. *Held*, that B. was estopped from claiming as against the sheriff that the goods belonged to himself and not to A.

But in estoppels affecting the legal title to land the fraudulent intent is necessary.

Perhaps it would subject land titles to great danger and radically evade the statute of frauds, if the *title to land* could be lost by the *conduct* of the owner, as construed by the modern doctrine of estoppel.

But where the party has *intended* a fraud, as has been stated, a man may lose his land by estoppel. One or two instances have been given at the commencement of this chapter, and reference will now be had to additional authorities, showing the elements of the estoppel as to land. Even in a very late case in New York† (where so many cases illustrating estoppel by *conduct* are to be found) the Court of Appeals have said: "As a general rule it would seem to be just that if a person does an act at the suggestion of another, the other shall not be permitted to avoid the act when it turns out to the prejudice of an antecedent right or interest of his own, although the advice on which the other party acted was given innocently and in ignorance of his claim.

* *Dezell v. Odell*, 3 Hill, 215. But in Tennessee it was held that the execution of an ordinary delivery-bond by one whose property is levied on as the property of the execution debtor, does not estop such party from asserting and proving the property to be his, and not that of the execution debtor. 3 Sneed, 374.

† *Trenton Banking Company v. Sherman*, 24 Albany Law Jour., No. 20, p. 390.

"The authorities establish the doctrine that the owner of land may by an act *in pais* preclude himself from asserting his legal title. But it is obvious that the doctrine should be carefully and sparingly applied, and only on the disclosure of clear and satisfactory grounds of justice and equity. It is opposed to the letter of the statute of frauds, and it would greatly tend to the insecurity of titles if they were allowed to be affected by parol evidence of light or doubtful character. To authorize the finding of an estoppel *in pais* against the legal owner of lands there must be shown, we think, either *actual fraud* or negligence equivalent to fraud, on his part, in concealing his title, or that he was silent when the circumstances would impel an honest man to speak." The rule of estoppel, as affecting the "title to land," applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land or loan money on it as security; or one who knowingly suffers another to deal with the land as though it were his own; or to one who knowingly suffers another to expend money in improvements, without giving notice of his own claim, and the like. It has been said, therefore, that "to preclude the owner of land from asserting his legal title or interest under such circumstances, there must be shown either actual fraud, or fault or negligence equivalent to fraud, on his part in concealing the title."*

This rule is said to be analogous to the familiar rule that a legal owner of land cannot be turned into a trustee *ex delicto* by any mere words or conduct. A constructive trust *ex delicto* can never be impressed on land as against the legal title by any verbal stipulation however definite, nor by any mere conduct; such trust can only arise where the verbal stipulation and conduct together amount to fraud in the contemplation of a court of equity. This is an equitable doctrine, and had its origin prior to and independently of the modern doctrine of equitable estoppel by conduct. As to the cases which construe the doctrine of equitable estoppel as it "affects title to land," in accordance with this idea, see the cases in note.†

* 2 Pomeroy Eq. Jur., § 807, notes.

† *Boggs v. Merced. Min. Co.*, 14 Cal., 279, per Judge Field; *Martin v. Zellerbach*, 38 Cal., 300; *Adams Eq.*, p. 151 (margin page); *Story Eq. Jur.*, § 301; *Evans v. Bicknell*, 6 Ves., 174; *Shin v. Croucher*, 1 De G., F. & J., 518;

In order, therefore, to operate as estoppel as to "title to land," the following ingredients should substantially appear:

1. That the party, making his admission by his declaration or conduct, was apprised of the true state of his own title. 2. That he made the *admission with the express intention to deceive*, or with such careless or culpable negligence as to *amount to constructive fraud*. 3. That the other party was not only destitute of all knowledge of the true state of the title, but of all means of acquiring such knowledge. 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved.

In a late case, in North Carolina,* the Supreme Court (Reade, J.) said: "In order to create estoppel *in pais*, it must appear,

"1. That the defendant knew of his title.

"2. That the plaintiff did not know, and relied upon the defendant's representations.

"3. That the plaintiff was deceived."

The court then said: "Some add a fourth requisite, that the defendant *intended* to deceive, but it is not necessary to decide this, as all other requisites are wanting."

The other North Carolina cases, cited in the note on the doctrine of equitable estoppel, while not analyzing the doctrine fully, have well expressed the reasons and principles upon which the rule is founded. Thus, in *Sherrill v. Sherrill*,† Judge Bynum de-

Brant v. Virginia Coal Co., 3 Otto, 326; *Story, Eq.*, § 391; *Wendell v. Van Rensselaer*, 1 Johns. Ch., 344; *Storrs v. Baker*, 6 Johns. Ch., 166; *Southard v. Sutton*, 68 Me., 575; *Kirkpatrick v. Brown*, 59 Ga., 450; *Stewart v. Mix*, 30 La. An. (part 2), 1036; *Lamar Co. v. Clements*, 49 Texas, 347; *Hart v. Giles*, 67 Mo., 175; *Godfrey v. Thornton*, 46 Wisc., 677; *Gregg v. Von Phul*, 1 Wall., 274; *Breeding v. Stamper*, 18 B. Mon., 175; *Hill v. Epley*, 31 Pa. St., 331; *Sherrill v. Sherrill*, 73 N. C., 8; *Sasser v. Jones*, 3 Ire. Eq., 19; *Sanderson v. Ballance*, 2 Jones Eq., 322; *Devereux v. Burgwin*, 5 Ire. Eq., 351.

* *Holmes and Wife et al. v. Crowell and Wife*, 73 N. C., 613, 627. It will be observed that Judge Reade speaks of *estoppel in pais*, and does not distinguish the differences, mentioned in the text, between the modern equity estoppel by *conduct* from that earlier equitable doctrine, by which a party could lose "title to land" by *estoppel*. In the latter doctrine *fraud*, either *actual* or *constructive*, is a necessary ingredient. No doubt the court would have so held in this case, if necessary, as it was in regard to *land*.

With this omission, the true doctrine as to the ingredients of the estoppel are well stated by Judge Reade.

† *Sherrill v. Sherrill*, 73 N. C., 8.

livered a well-considered opinion, in reply to this inquiry: "If one, having the title to land, intentionally induce another to purchase from one who has no title, can he be permitted afterwards to assert his title, and defeat the purchaser?" He cited what was said in *Devereux v. Burgwyn*,* as follows: "If one acts in such manner as intentionally to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he otherwise would not have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages." The element of *intent* is manifest in all these cases, and the doctrine is accurately stated in all the North Carolina cases, where the title to land is involved and to be affected. Especially do the facts in *Sasser v. Jones*,† and *Saunderson v. Ballance*,‡ correspond with the facts of this case, and called forth similar reasoning.

In the case of *Sherrill v. Sherrill*, the court further said: "Where, by reason of the fraud, equity will interpose, and where, when it does interfere, it will not stop half-way by simply enjoining the party from taking advantage of his legal title, but will go farther, and do complete justice by compelling the party to do what, in equity and good conscience, he is bound to do—make his representations specifically good."§

And the rule has been properly circumscribed in this State, so as to avoid the danger of passing *title* to lands by *estoppel* made up from facts and acts not tainted with fraud.

Thus, in *Melvin v. Bullard*,|| the court (Smith, C. J.) says: "Mere words, however often uttered, do not convey an interest in land, or extinguish the legal title thereto, unless when another,

* *Devereux v. Burgwyn*, 5 Ire. Eq., 351.

† *Sasser v. Jones*, 3 Ire. Eq., 19.

‡ *Saunderson v. Ballance*, 2 Jones Eq., 322.

See, in accord, *Redmond v. Graham*, 80 N. C., 231; *Mason v. Williams*, 66 N. C., 564; *Henderson v. Lenly*, 79 N. C., 169; *Young v. Young*, 81 N. C., 92; *Exum v. Cogdell*, 74 N. C., 139; *Sigmon v. Haun*, 86 N. C., 314; *Gay v. Stancell*, 76 N. C., 369.

§ *Adams Eq.*, 150; *Sugden on Vendors*, 262.

|| *Melvin v. Bullard*, 82 N. C., 33. In accord, *Adams Eq.*, 151. See also *Hewitt v. Loosemore*, 9 Hare, 449; *Colyer v. Finch*, 5 House Lds. Cases, 905; 2 Hump., 270; *Channing v. Simmons*, 5 Hump., 299. In accord, *Decherd v. Blanton*, 3 Sneed (Tenn.), 374; *Hamilton v. Zimmerman*, 5 Sneed, 48; 2 *Head*, 608.

acting upon the representations, has been induced to part with something of value, or assumed obligations, and it would be a fraud upon him to allow the party afterwards to assert a claim or title to his injury."

The doctrine of estoppel has its foundation in the obligation under which every man is placed to speak and act according to the truth of the case, and in the policy of the law to suppress the mischief which would arise from the destruction of all confidence in the intercourse and dealings of men if they were allowed to deny that which by their solemn and deliberate acts they have declared to be true. When a fact has been admitted or asserted for the purpose of influencing the conduct or deriving a benefit from another, so that it cannot be denied without a breach of good faith, the law enforces the rule of good conduct as a rule of policy, and precludes the party from repudiating his representations or denying the truth of his admissions.*

"He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to be silent."†

Says the court of Mississippi: "There has developed in the Court of Chancery the doctrine of equitable estoppel, a beneficent doctrine, which operates for the advancement of justice in proper cases without deed or record; which takes hold of the conscience of a party, and closes his mouth *now*, because he was silent when it was his duty to speak, and which will not tolerate a denial of his declarations or acts on the faith of which others have engaged in important transactions. An heir who has received money for his land, sold under a probate decree by the administrator or guardian, is estopped to assert his legal title, unless he puts the parties in their former condition, if that be practicable."

The same court says: "One who stands by and sees another assert title to his property and sell it, will not be heard to dispute the title of the purchaser, if he remained silent, and did not, when good morals and honesty required it, disclose his right."‡

* *Cooley v. Steele*, 2 Head. (Tenn.), 608; *Tipton v. Powell*, 2 Cold., 23; *Ruffin v. Johnson*, 609; see 2 Meigs's Digest, "Estoppel," 1433.

† *Broyles v. Nowlin*, 3 Baxter, 195. A party cannot claim under an instrument and at the same time repudiate it: *Swanson v. Torkington*, 7 Heisk., 613.

‡ *Vicksburg, etc., R.R. Co. v. Ragsdale*, 54 Miss., 200, citing with approval *Lee v. Gardner*, 26 Miss., 521; *Kempe v. Pintard*, 32 Miss., 324; *Wilie v. Brooks*,

The Supreme Court of the United States* has recently said on this question: "For the application of the doctrine (of equitable estoppel) there must generally be some *intended* deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury." "In all such cases," says Story, "the doctrine proceeds on the ground of constructive fraud, or of gross negligence, which in effect implies fraud. . . . The element of fraud is essential, either in the intention of the party estopped or in the effect of the evidence which he attempts to set up."

I have thus selected the opinions and arguments on this question from the different courts both of the States and of the United States, as well as the English, in order that a broad and comprehensive view may be taken of the subject, and to show that the reasons for the doctrine and its application are very much the same everywhere, notwithstanding the slight shades of difference in some of the cases.

It must be observed, too, that it is not attempted here to discuss the full doctrine of equitable estoppel, especially estoppel by *conduct*, in its application by a court of equity to the manifold transactions where personal property may be affected, but the object of this chapter is to determinate how far this doctrine extends, and what are its effects, both in equity and law, upon the "title to land." The statute of frauds having provided how "title to land" may be evidenced, and the several statutes of the States, requiring more formality and solemnity in its transmission than that of personal property, the courts should be slow and cautious in framing a different rule by which "title to land" should be *acquired* or *lost*.† But with this caution, and with the

45 Miss., 542; Cowen v. Alsop, 51 Miss., 158; McMurran v. Soria, 4 How. (Miss.), 154; in this case, the "corporation" was held subject to the same doctrine.

* Brant v. Virginia Coal and Iron Co. et al., 93 U. S., 326, citing Hill v. Eppley, 31 Penn. St., 334; Henshaw v. Bissell, 18 Wall., 271; 14 Cal., 368; 10 Barr, 531; 28 Me., 539; 6 Hill, 616; 109 Mass., 53.

This case of Brant v. Virginia Coal and Iron Co., has been recently cited with *approval* by the Supreme Court of Illinois, Kinnear v. Mackey, 85 Ill., 96; although ignoring in that State the element of fraud. In accord, Wash. R. P., vol. 3, ch. 2, sec. 96.

† Barker v. Bell, 37 Ala., 359; McPherson v. Walters, 16 Ala., 714.

qualifications herein described, the doctrine of estoppel has become (in the language of the Mississippi court) "a beneficent doctrine," tending to a very large extent to promote fair dealing among men, and the ends of justice generally.

For a more thorough investigation of the doctrine of estoppel *in pais*, affecting "land," attention is called to the third volume of Washburn on *Real Property*, title "Estoppel."

As to the limits of this doctrine it might be further said :

1. An estoppel *in pais*, where it applies, is as effectual as a deed, but no more so. So that, if the party doing the act could not have made a deed for the land in question, his act cannot create an estate by estoppel in the same.*

2. A party who insists upon the act of another as working an estoppel must show that he acted upon the same, and that it formed the *inducement which led him at the time* to do what he did.

3. In case where mere *passive silence* is claimed as estoppel, the better opinion is that, if a man holds a title to his lands by deed which has been duly recorded, it is all the notice he is bound to give so long as he remains passive; and it is only when he sees another purchasing land upon which he has some unrecorded lien or charge, of which the other is ignorant, that he is bound to give notice thereof.†

4. If the party purchasing is cognizant of the *facts*, he cannot avail himself of his *ignorance* or *mistake* in respect to their *legal effect*.‡

As to estoppel *in pais*, it may be observed that it is called an *equitable estoppel*, but not because it is recognized and acted upon only in a court of chancery, but for the reason that this estoppel arises out of a state of facts which make its application and enforcement equitable and just. And they are administered and acted upon both in courts of equity and law. So that, if the defendant in an action at law, as for instance an action of trover,

* *Lowell v. Daniels*, 2 Gray, 169; 28 Penna. St., 124; 3 Wash. R. Prop., 74.

† 3 Wash. R. Prop., ch. ii., § 6; *Gray v. Bartlett*, 20 Pick., 193. This was precisely the facts in the case of *Sanderson v. Ballance*, 2 Jones Eq. (N. C.), 322. In this case Ballance, having an unregistered deed for half of the tract of land, stood by at the sale, and, when inquiry was made as to the title, he failed to give the information; he was held to be estopped.

‡ *Storrs v. Barker*, 6 Johns. Ch., 166; *Wood v. Griffin*, 46 N. H., 237. As to an exceptional instance, see *Jordan v. Stephens*, 51 Me., 84.

has matter of estoppel *in pais* to allege, he need not go into a court of equity to enforce the same. This view has recently been strongly stated by Judge Cooley, of Michigan, in the case of *Barnard v. Jerman American Seminary and others*.*

The warrant for the doctrine of estoppel *in pais* is that it sustains the cause of right and justice.†

The equitable estoppel, it is true, has been built up mainly by the courts of equity, but the courts of law have followed it; while the common-law estoppel, by which title to land passes, was built up under the "curious learning" of the courts of common law, and *this* is followed by the courts of equity.

Title by Estoppel—Legal Origin.—Under this head it is proposed to treat of the common-law estoppel, the effect of which is to *pass title to land*. This doctrine had its origin in the times of the feudal tenures, and was the effect of the several common-law modes of conveyance, such as feoffment, fine, recovery, and lease. This subject presents the most striking and complicated doctrine in all the "curious learning" of estoppel.‡ It arises as follows: "Where a grantor *without title* makes a *lease* or *conveyance* of land by deed *with warranty*, and subsequently by descent or by purchase acquires the ownership, this *after-acquired* title of the grantor inures by estoppel to the benefit of the grantee." In other words, in a case of this kind, the grantee having taken nothing by his deed at the time (the grantor having no title), he takes it *now* by estoppel. Now there would seem to be much *equity* in the strictly common-law rule of property; the grantor holds out to the grantee that he *has* title; he *warrants* the title, but he has no title at the *time*; but *subsequently* he obtains the title, either by descent or purchase; without subtle and refined reasoning on the subject, plain equity and a sense of common justice say, let the title *promised* to the grantee *pass* to him.

But it may be said it is the result of the *contract of warranty*; this is so; but at last it is the equitable and just *construction* of

* *Barnard v. Jerman Am. Seminary et al.*, 13 Northwest Reports, 811 (for 1882); citing 33 Mich., 92; 41 Mich., 456; *Horn v. Cole*, 75 Ill., 516.

† *Ferguson v. Millikin*, 42 Mich., 441; *Boyce v. Wartrous*, 73 N. Y., 597; *Buckingham v. Hanna*, 2 Ohio St., 551; *Rensselaer v. Kearney*, 11 How. U. S., 297. See *Trenton Bk. Co. v. Duncan*, 86 N. Y., 221; *Wade v. Sanders*, 70 N. C., 270.

‡ Bigelow on Estoppel, p. 322, ch. xi.; Rawle on Covenant for Title, ch. ix.

that *contract*, growing out of the idea of good faith and fair dealing among men. In other words, the courts of common law, after much "curious learning," discovered a mode of enforcing a *contract* in the *interest of justice*, which is now done by the courts of equity *without a contract*, and without this "tangled web of learning," for the simple reason that a man should not be allowed to repudiate his own deliberate acts when such *conduct* results in injury to another. But, to speak of the common law on this question, this *warranty* was what is called a "covenant real," annexed to the estate of freehold or inheritance, and followed the land into the hands of the heirs of the grantor.

Says Blackstone: "By the feudal constitution, if the vassal's title to enjoy the fee was disputed, he might vouch, or call the lord or donor to warrant or insure his gift, which, if he fail to do, and the vassal was evicted, the lord was bound to give him another feud of equal value in recompense. And so by our ancient law if, before the statute *quia emptores*, a man enfeoffed another in fee by the feudal verb *dedi*, to hold for himself and his heirs, by certain services, the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift), were originally stipulated to be rendered. But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores*, the feoffor only is bound to the implied warranty, and not his heirs, because it is a mere personal contract on the part of the feoffor, the tenure, and of course the ancient services, resulting back to the superior lord of the fee."*

To show the reason of this doctrine of estoppel, I quote from what Mr. Bigelow says,† taking the idea of Coke: "In either sort of warranty, lineal or collateral, if the warrantor should implead the warrantee, the latter (the tenant) might show the warranty and demand judgment, whether contrary to the warranty, the warrantor should be suffered to demand the thing warranted, and this was called a rebutter. This rebutter was given as a defence to the title to avoid circuity of action, since if the demandant were to have recovered contrary to the warranty, the

* 2 Black. Com., 300; Touchstone, 182.

† Bigelow on Estoppel, pp. 325, 326; Coke, Litt., 265; Hermon on Estoppel, 277.

other party would recover the same lands, or lands of equal value, by force of the warranty." The policy of the law was to prevent circuity of action, and such was the effect.

But, to simplify the idea: A. makes a feoffment or conveyance to B., with warranty. A. has no title; but, *subsequently*, he or his heirs *acquire* the title, and then sue B. on this after-acquired title; B. says, in reply to A., "You ought not to recover this land. I have a *contract* of warranty, and will bring an action to recover a sum equal in value to the land sought to be recovered." This, under the *ancient learning*, was called *rebutter*,—the grantor and his heirs were rebutted,—which was given as a defence to the title to avoid circuity of action. Have we not an analogy under the code practice?

A. makes a *contract* to convey to B., puts the vendee in possession, and subsequently brings ejectment for the land against B., ignoring the contract to convey; B. thereupon demands judgment whether, contrary to the *contract to convey*, the vendor should be suffered to recover the land. The statute calls this a "counter-claim," perhaps somewhat like the "rebutter" in ancient law of warranty, but it prevents multiplicity of lawsuits and circuity of action. And the *vendor* is estopped from a denial of the effects of his contract, and on the performance of the contract by B., the vendee, the title is ordered to be made in accordance to contract; in other words, the vendor is *rebutted*, not by a contract of warranty, but by the *contract to convey*.

The Doctrine as Applied to Existing Conveyances of Land—Grantor and Grantee.—As a general rule, upon the acquisition of title by the grantor of a warranty-deed, made *before* title acquired, the interest inures to the grantee, and gives him a title by estoppel. But, if the deed is made without warranty, this result does not follow, as appears by the cases cited in the note.*

The deed must be voluntary and not *invitum*, and hence a sheriff's deed will not bar the judgment debtor from claiming the

* *Weed Sewing Machine Co. v. Emerson*, 115 Mass., 554; 102 Mass., 102; *Western M. Co. v. Peytonia Coal Co.*, 8 W. Va., 406; *Brown v. Phillips*, 40 Mich., 264; *Jackson v. Wright*, 14 Johns., 193; *Rawle on Covenants of Title*, 390 (note 1); *Smith v. De Russy*, 29 N. J. Eq., 407; *Hart v. Gregg*, 32 Ohio St., 502.

land under an after-acquired title, whether the deed be with or without warranty.* The sheriff's deed is binding, of course, as to the existing title.†

Cases where Warranty Unnecessary.—If the deed of the grantor contains a *recital*, or affirmation, express or implied, that he is seised of a specific estate, which estate is conveyed to the grantee, then according to the doctrine of estoppel by “recitals” in deeds, the grantor could not controvert the same whether true or false. The effect of which is, that an after-acquired title goes to the grantee by estoppel, as though the deed had contained a warranty (the warranty being unnecessary in a case of this kind). And in the case of *Van Rensselaer v. Kearney*,‡ the Supreme Court of the United States held that if the averment of a specific estate was not in so many words, yet, if the court could gather from the whole deed an affirmation of a particular interest, which interest the deed purported to convey, the grantor and those claiming under him, were bound by the estoppel without any express warranty in the deed. It results, therefore, that estoppels by recitals in deeds are, in some respects, as effectual as if they were actual warranties. As if a party recite that certain conveyances had been made to him, or describes the land as bounded by a street, he would be estopped to deny that such conveyances had been made, or that such a street existed.

He is not only estopped from denying the deed itself, but every fact which it recites.§

This principle was thus expressed: “The reason was, that the

* *Frey v. Ramseur*, 66 N. C., 466; *Emerson v. Sansome*, 41 Cal., 552; 11 Ga., 578.

† *Gorham v. Brenon*, 2 Dev., 174.

‡ *Van Rensselaer v. Kearney*, 11 How. (U. S.) B., 297; the following cases were cited, *Goodtitle v. Bailey*, 2 Cowp., 601; *Bensley v. Bordon*, 2 Sim. & S., 524; *Doe & Merchant v. Errington*, 8 Scott, 210; *Bowman v. Taylor*, 2 Ad. & E., 278; *Stow v. Wyse*, 7 Conn., 214; *Penrose v. Griffith*, 4 Binn., 231; *Den v. Cornell*, 3 Johns. Cas., 174; *Carver v. Jackson*, 4 Peters, 1. To the same effect, see *Backelder v. Lovely*, 69 Me., 33; *McGruder v. Esmay*, 35 Ohio St., 221. Grantor cannot in equity allege the land was held *adversely* when the deed was made: *Ruffin v. Johnson*, 5 Hiesk. (Tenn.), 604. See the general doctrine discussed by Judge Nicholson, in *Kerbaugh v. Vance*, 6 Baxter, 110 (Tenn.).

§ See *Van Rensselaer v. Kearney*, 11 How., 322; *Clark v. Baker*, 14 Cal., 629.

estate thus affirmed to be in the party at the time of the conveyance, must necessarily have influenced the grantee in making the purchase, and hence the grantor, and those in privity with him, should, in good faith and fair dealing, be forever thereafter precluded from gainsaying it.”*

This principle has been applied (without regard to warranty) to the conveyance of a married woman.† But, “in cases of this kind, the question whether the grantor or his heirs will be precluded from claiming the newly-acquired estate will depend upon the nature of the recital or implied affirmation. If to assert the interest is not inconsistent with the recital, the grantor and those in privity with him may, of course, assert it. The estoppel will be no wider than the terms of the deed.”‡

Mr. Washburn treats the “recitals” and the “deed” itself under the head of “estoppel by deed,” and says: “The most striking instances of estoppel by deed, perhaps, are those where a party, without any title to land, undertakes to convey it, covenanting as to the title, and afterwards acquires title to the same land by descent or purchase.”§

In Louisiana, this doctrine applies to mortgages, so that if one mortgages land without having title, the after-acquired estate will inure to the benefit of the mortgagee.|| Says the same writer: “The effect is, that the title, acquired by the grantor, who has conveyed with warranty, inures *eo instanti*; that he gains the title to his grantee, and vests in him, or to the grantee of such

* Release of dower is not a conveyance, and the widow may, of course, set up a title which she has acquired since releasing: *McLeery v. McLeery*, 65 Me., 172. As to the effect of estoppel from the terms of the deed, see *Jacksonville R. Co. v. Cox*, 91 Ill., 500. As to the same, and also as to an estoppel against an estoppel, see *Martin v. Marlow et al.*, 65 N. C. Rep., 695.

† *King v. Rea*, 56 Ind., 1; *Nicholson v. Caness*, 45 Ind., 447; *Cowles v. Marks*, 53 Ala., 499; *Dukes v. Spangler*, 35 Ohio St., 119, 127; *Strong v. Waddell*, 56 Ala., 471. (See chapter Estoppel on Married Women.) The common-law rule, by which a married woman was not bound by her covenants, has been greatly modified by the Married Women's Acts. Both infants and married women may, sometimes, be bound by estoppel *in pais*; see *Bigelow on Estoppel*, part 3, p. 387.

‡ *Bigelow on Estoppel*, 334.

§ 3 Wash. R. P., ch. 2, § 35, citing *Nunnally v. White*, 3 Met. (Ky.), 589.

|| *Amonett v. Amis*, 16 La. An., 227. For a collection of the American cases on estoppel by deed, see 2 *Smith's Leading Cases* (5th Am. ed.), 626; cases cited *supra*.

grantee, if with like covenants. But if, before the covenantor acquires a title, the covenantee sue for a breach of the covenant of seisin, it seems that he could not defeat that action by purchasing in the title and tendering it to his covenantee, if the latter refuse to accept it."

Nature of the Covenant, as it Affects Certain Results.—1. It need not be a general covenant of warranty. The grantor may covenant against a particular title, which he afterwards obtained, or he might covenant against incumbrances, and afterwards buy in an outstanding equity existing prior to his conveyance; in these cases the titles thus acquired inure to the benefit of the grantee.*

2. This covenant must be something more than a personal covenant of the party who makes it. It must be of a nature to run with the land and attach to it, in which event it affects the land the instant the covenantor acquires the title, which his deed undertook to convey.† A man cannot recover in ejectment against a defendant, whose possession he is bound to maintain by a valid covenant of warranty.‡

In the case of *Patterson v. Pease*, cited, the court of Ohio held that, under the statute of that State, a deed would not pass the title to land, except when *attested* by two witnesses, and not operating so as to pass the title, it cannot contain a covenant of warranty that works an estoppel against the maker in asserting the legal title remaining in himself. The court admitted the general doctrine as here stated, but the difficulty was to ascertain in what manner the covenant of warranty may be created. The court said: "A warranty of this character does not arise from a mere personal engagement. It must be a *covenant real* annexed to the land, and running with it. It may be raised upon any description of conveyance, by which the title passes, or even upon a naked release, or deed of confirmation, that technically passes no title. In language of 10 Rep., 56, 'Every warranty ought to be knit and annexed to an estate, for every warranty hath its essence by dependency on an estate, and when the estate expires

* *Brundred v. Walker*, 1 Beasley (N. J.), 140; 3 Wash. R. P., ch. 2, § 38, Bigelow, Estoppel.

† 2 Smith Lead. Cases (5th Am. ed.), 640; *Patterson v. Pease*, 5 Ohio, 190.

‡ 4 Ohio R., 411; 3 Ohio, 107.

by its own limitation, the warranty depending on it is determined.' We do not understand by this that a warranty does not bind as a covenant, unless the estate actually passes by the deed. Our understanding is that no warranty, to operate as a rebutter, can be created, except by a deed executed in the form in which the law permits an estate to pass. We have looked in vain for such a warranty in any other form than in the deed executed with the legal formalities." Lord Coke has said: "If a man make a feoffment, with warranty of the freehold, *non feofavit* is a good plea; for, if the feoffment be avoided, the warranty is likewise avoided, as that depends on the feoffment."

The court, from which the foregoing quotation is made, further said: "But the instrument itself, or the fact that the owner has attempted to convey land by an imperfect instrument, has never been held to bar him from setting up his title, unless it contains an *effective* clause of warranty." But this case was an action of ejectment, and the rule here described is the strict legal rule; it was impliedly admitted that a court of equity might hold the estoppel available, but to hold so in this case, the judge said, "would subvert the well-established principle that an equitable title can neither support nor defeat a recovery in ejectment."

If the purchaser, instead of claiming the after-acquired land, sues upon the covenants, and recovers damage for the breach, he would be estopped from claiming the land thus after-acquired by the covenantor.*

3. The effect of the covenant will be limited in its extent by the premises granted, and with which it may run; as illustrated in the case of the grantor owning an undivided sixth part of certain premises, conveyed by deed all his estate in the premises and covenanted against the claims of all persons to the estate, he was estopped only to the one-sixth, and not to the other interests which he might obtain afterward.†

So, where there is a recital of outstanding mortgage, with covenants of warranty, the covenant is qualified by the recital.‡

4. If the grant or deed be in the form of a release and quitclaim of all the grantor's right, claim, or title to the land de-

* *Blanchard v. Ellis*, 1 Gray, 195; *Porter v. Hill*, 9 Mass., 34; 20 Me., 260.

† 3 Wash. R. P., ch. 2, § 40; *Wright v. Shaw*, 5 Cush., 56.

‡ *Jackson v. Hoffman*, 9 Cow., 271.

scribed, with a covenant of warranty against all persons claiming by or under him, he would be estopped to claim any title existing in him at the time of making the deed, but he would not be as to the after-acquired title. In this case, he professes to convey his "interest," and not the legal title, and, if the warranty was general, the recitals might limit the same.*

Says Washburn: "It is upon the grounds above stated that it has been held that, in order to bar a party by his covenant of warranty, not only must the deed be a good and valid deed in its form and mode of execution; but it must convey no title to the premises, nor pass anything upon which the warranty can operate, for, if it passes a title or interest, the covenant does not operate as an estoppel, even though it cannot operate upon the interest to the full extent of the intention of the parties."†

Other instances are given in the books, as where the grant was for all of the grantor's right, title, and interest in certain premises, with covenants that neither the grantor nor any person claiming under him, should claim, etc., this was held a qualified warranty of the land conveyed. The warranty was coextensive with the estate which the deed purported to convey, but, as that did not purport to convey any interest thereafter to be acquired, it did not affect the after-acquired title.‡

It has been held, where a guardian conveyed lands, and entered into covenants of warranty as to title in the deed, he was held to be thereby estopped from setting up a personal claim to the same land under his own title.§

It is the same as to trustees, executors, and administrators, who covenant for title without authority on behalf of the *cestui que trust* or heirs. The warranty being unauthorized by the persons intended, the law treats it as the undertaking of the trustee, executor, or administrator. If the grant was general, they could not hold an after-acquired interest as against the grantee and his privies.||

* *Mastin v. Marlow et al.*, 65 N. C., 695; *Comstock v. Smith*, 13 Pick., 116; *Kinsman v. Loomis*, 11 Ohio, 475; 14 Me., 351; 43 Me., 432; *Doane v. Wilcutt*, 5 Gray, 328.

† 3 Wash. R. P., ch. 2, § 41.

‡ 3 Wash. R. P., ch. 2, § 41, citing *Miller v. Ewing*, 6 Cush., 34, 40; 10 Cush., 134; *Gee v. Moore*, 14 Cal., 472; *Newcomb v. Presbrey*, 8 Met., 406.

§ *Heard v. Hall*, 16 Pick. (Mass.), 457.

|| *Bigelow, Estop.*, 341; *Prouty v. Mather*, 49 Vt., 415.

5. If the covenant should become extinguished, it could have no effect upon the after-acquired title.

On this proposition, Mr. Bigelow refers to a recent case in Wisconsin.* In that case ejectment was brought on the following state of facts: The land had been conveyed by A. to B., with warranty, B. conveyed to C., and C. then conveyed it back to the first grantor, A. The plaintiff took a conveyance of the land from B., after he had conveyed to C., and, in a suit against A., he now claimed that A.'s after-acquired title inured to him by reason of the covenants in the first deed by A. to B. But the court ruled otherwise. The fact that the plaintiff claimed through divers mesne conveyances from the defendant, who had conveyed with warranty, and the further fact that the defendant had again acquired the title, did not affect the case, and constituted no estoppel against the defendant. The covenant, which passed to C., had been extinguished by the conveyance of the land from C. back to the defendant. The plaintiff, having taken a deed from an intermediate grantee after he had parted with the title, was not in a position to set up an estoppel.

It should not be forgotten that under the idea of estoppel by "recitals" in the deed, if there be no warranty but the grantor set forth on the face of his conveyance, by averment or recital, that he is seised of the fee simple, or any particular estate in the premises, and which estate the deed purports to convey, the grantor and all persons in privity with him shall be estopped from ever afterward denying that he was seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title, as between parties and privies.†

In the absence of such "recital," or positive averments, the covenant of warranty or other covenant is necessary to create an estoppel as to the after-acquired title. "Where it distinctly appears in a conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intend to convey and

* *Goodell v. Bennett*, 22 Wis., 565; *Bigelow, Estop.*, 342-343.

The Bankrupt Act of 1841 did not distinguish covenants of warranty in a deed. *Bush v. Cooper*, 18 How. (U. S. Rep.), 82.

† *French v. Spencer*, 21 How., 228; *Hermon on Estoppel*, 278; *Landes v. Brant*, 10 How., 374; *Van Rensselaer v. Kearney*, 11 How., 325.

receive reciprocally a certain estate, they are estopped from denying the operation of the deed, according to its intent.”*

“If the deed bears upon its face evidence that the grantor intends to convey, and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still the legal operation is the same.”†

Improvements made by the grantor in possession inure to the benefit of the grantee.‡ Hence, an action against the mortgagor by a creditor who has an execution-attachment to recover possession of certain improvements, could not be maintained. The owner had, prior to the attachment, mortgaged the property to a third person, and had then erected the improvements in question; the court held that the owner, by his mortgage, would be estopped in a contest between him and his grantee from asserting the title by the covenants in the mortgage deed.

Covenant for Quiet Enjoyment.—Covenants for quiet enjoyment, in themselves, are held to be as effectual, by way of estoppel, as words of conveyance.§ And it seems to rest upon the same grounds to prevent the circuitry of action. So that, should the grantor obtain a paramount title, and attempt to disturb the possession of the grantee, he could set up the covenant for quiet possession as a rebutter.

Implied Warranty, among Tenants in Common.—The law implies a warranty among tenants in common. Where partition has been made, each partitioner becomes the warrantor of all the others to the extent of his interest, as long as the privity of estate exists between them.

No tenant, after partition made, can set up an adverse title to the portion of another for the purpose of ousting him from the part which has been partitioned off to him.||

* Hermon, Estop., 279, and authorities cited; Rawle on Covenant, 388.

† Herman, Estop., 291; Van Rensselaer v. Kearney, *supra*.

‡ Humphreys v. Newman, 51 Me., 40.

§ Long Island R. Co. v. Conklin, 29 N. Y., 572; Smith v. Williams, 44 Mich., 240.

|| 1 Washburn, Real Prop., 431; Jones v. Stanton, 11 Mo., 433; 2 Black. Com., 300; Bigelow, Estp., 346; Farran v. Christy, 33 Miss., 44. As to the qualifi-

But, it may be well to notice further the law in regard to the effect of a deed of bargain and sale, when with and when without covenants. In England, the bargain and sale, under the statute of uses, like a release, passed no title which the bargainor had not at the time, and consequently no after-acquired title inured to the benefit of the bargainee. The American authorities are numerous and painfully conflicting. In the early cases in New York, and that, too, by Judge Kent, it was held that a deed of bargain and sale, even without covenants of warranty, had the effect to estop the bargainor from claiming an after-acquired estate. But Mr. Rawle says this "doctrine was soon after abandoned," and says in the text that under the general holdings of the American courts: "Where one conveyed land to which he had no title, by deed of bargain and sale, *containing no covenants for title*, nor any intimation that the grantor expected to become invested with an estate of a particular description, a subsequently acquired title would not inure to the benefit of the grantee, even as against the grantor and his heirs. . . . That, as a general rule, in order that an after-acquired title should pass by estoppel, it is necessary that the deed should contain covenants for title of some sort or kind."*

But, on looking into this vast array of authorities, it will be seen that, at last, most of our deeds of bargain and sale will operate as an estoppel on the after-acquired title, as generally enough appears on the face of the deed to indicate what the parties intend (even where there are no technical covenants). When it is said that the vendee must "take the precaution to secure himself by the proper covenants of title," it has reference to a deed of bargain and sale, and sale by release or quitclaim, in the *strict and proper sense* of that *species of conveyance*.

This is the doctrine of *Van Rensselaer v. Kearney*, in which much of this doctrine was carefully examined by the Supreme Court of the United States. And hence it was said in that case: "If the deed bears upon its face evidence that the grantor intended to convey and the grantee expected to become invested with an estate of a particular description or quality, and that the

cation of this rule, see *Walker v. Hall*, 15 Ohio St., 355, which case involved the right of dower.

* Rawle on Covenant of Title, 390 (notes). (See authorities heretofore cited.)

bargain had proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted ; at least, so far as to estop them from ever afterward denying that he was seised of the particular estate at the time of the conveyance."

After referring to a number of authorities, the court further said: "The principle deducible from these authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance."* The idea is this,—the first grantee has an *equity* to have the after-acquired estate conveyed to him. And this doctrine, as applied in most of the American States, is simply the enforcing this equity in a court of law ; but law follows equity as equity follows law, and the equitable doctrine that "when equities are equal, the legal title shall prevail," cannot be disregarded in a court of law enforcing equitable principles.† This rids the doctrine of estoppel of much of its "curious learning."

The statutes of several of the States have regulated this question so as to avoid judicial controversy ; thus, the 33d section of the California Act provides: "If any person shall convey any real estate by conveyance, purporting to convey the same in fee simple absolute, and shall not, at the time of such conveyance,

* *Van Rensselaer v. Kearney*, 11 How. U. S., 298. This case has been cited with approbation by the same court since in *French v. Spence*, 21 How. U. S., 240 ; in accord, *Gibson v. Chouteau*, 39 Mo., 566 ; *Clark v. Baker*, 14 Cal., 629 ; *Cald v. Chapman*, 2 P. F. Smith (Pa.), 359 ; *Nixon v. Coreo*, 28 Miss., 426 ; *Doyle v. Peerless Petroleum Co.*, 44 Barb., 240 ; *Temple v. Partridge*, 42 Me., 56 ; *Potter v. Potter*, 1 R. I., 43.

† *Bigelow Estop.*, 375, note 2.

have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid, as if such legal estate had been in the grantor at the time."*

But it has been held that "the words 'bargain,' 'sell,' 'release,' 'quitclaim,' and 'convey'" are words of release and quitclaim merely. They carry the grantor's interest and estate in the land described, whatever it may be; they do not of themselves purport to do anything more; they do not even raise the statute covenants implied in the words '*grant, bargain, and sell,*' nor would these covenants operate as the ancient common-law warranty to transmit a subsequently acquired title."†

It was said, in this case, that the deed in question made no positive averment that the grantor is seized or possessed of any particular estate so as to come within the doctrine of *Van Rensselaer v. Kearney*, *supra*. Averments, to create an estoppel, must be positive and certain.

"Where the truth appears by the same instrument that the grantor had nothing to grant, or only a possibility, there is no estoppel."‡

Likewise, in Massachusetts, where the granting part of the conveyance was "all my right, title, and interest," the court held this but a quitclaim deed, and, although followed by a general warranty, the covenant was governed by the granting part of the deed.§ But in other States the holding is directly the opposite.

Thus, in the case of *Jones v. King*,|| the grant was "all right, title, and interest, and claim," and the covenant was as follows: "And the said James A. King and William King, for themselves and their heirs, do by these presents covenant to and with the said Thomas C. King that they will forever warrant and defend the title to the said tract of land or lot of ground, to be free from

* *Clark v. Baker*, 14 Cal., 630. See reference to the statutes in *Rawle on Cov.*, 391-2.

† *Gibson v. Chouteau*, 39 Mo., 567; *Bogy v. Shoab*, 13 Mo., 365.

‡ *Rawle on Covenant*, 404 (note 2); *Mastin v. Marlow*, 65 N. C., 695.

§ *Hoxie v. Finney*, 16 Gray, 332; *Allen v. Holton*, 20 Pick. (Mass.), 458. Same holding in Maine. See *Kinnear v. Lowell*, 34 Me., 299. See also *Russ v. Apaugh*, 118 Mass., 369.

|| *Jones v. King*, 25 Ill., 384; also *Mills v. Catlin*, 22 Vt., 98; 12 Penna. Stat., 106.

the claim or claims of himself and his heirs, and all other persons claiming by, through, or under him, and also from the *claim or claims of all and every other person or persons whomsoever.*" The court of Illinois held this covenant to the quitclaim deed in this case was a rebutter, and estopped the bargainor and his privies from relying on an after-acquired title.

A grant by a person who has no estate, as an heir in the lifetime of his ancestor, will not pass any estate. A bare possibility of an interest which is uncertain is not grantable. The expectancy of an heir-at-law in the lifetime of the ancestor is said to be less than a possibility. But in these cases, where the deed is by warranty, the warranty will rebut and bar the grantor and his heirs of a future right.*

In the case of *Boynton v. Hubbard*,† the court of Massachusetts (Judge Parsons) held, after full argument, that a contract made by an heir to convey on the death of his ancestor, could not be sustained either in law or equity, the same being contrary to public policy.

But the doctrine is now well settled the other way; and "a mere expectancy, as that of an heir-at-law to the estate of his ancestor, or the interest which a person may take under the will of another then living, or the share to which such person may become entitled, under an appointment, or in personal estate, as presumptive next of kin of a person then living, is assignable in equity for valuable consideration, and where the expectancy has fallen into possession, the assignment will be enforced."‡

* In *Mastin v. Marlow*, 65 N. C., 695, it was held that, "where A., an heir expectant of B., executed a deed to C. for his entire interest in . . . and also his entire interest in all the real estate of B., that the said A. may be entitled to, as one of the children and heirs-at-law," it does not convey such an interest as could be enforced in a court of law under the old procedure; but resort must be had to a court of equity. The remedy was held to be in some cases where the consideration is fair and adequate, and no undue advantage, specific performance, in others, where advantage was taken of the necessity of the party, the contract is held as a security for the return of the purchase-money with interest. The deed in this case was said, by C. J. Pearson, not to work an estoppel, for the instrument exhibited a case of "estoppel against an estoppel, which doth put the matter at large."

† 7 Mass., 112.

‡ *McDonald v. McDonald*, 5 Jones (N. C.), Eq., 21; in which case Judge Battle cites a large number of authorities, both English and American. See

Where no Interest Passes an Estoppel Arises.—In a deed of lease, especially, it is established that where no interest passes, an estate by estoppel is created between the parties and their privies. An example: "If a man makes a lease by indenture of D., in which he hath nothing, and afterwards purchases D. in fee, and suffers it to descend to his heir, or bargains and sells it to A., the heir or A. shall be bound by this estoppel, and so shall the lessee and his assignee." For, where an estoppel works on the interest of the land, it runs with the land into whose hands soever the land comes, and ejectment is maintained upon the mere estoppel.*

The converse of this proposition is true. "*Where an interest passes no estoppel arises.*" The principle is simply this, says Mr. Bigelow, "That while the lessor shall not be permitted to say that he had no estate when he executed the lease, he may say that he exhausted his interest by the lease."† If the tenant takes *nothing* by his lease, he has an interest by estoppel; but, if he take *anything* by the lease, he holds by the lease. The effect of a tenant's granting a lease of greater interest than he possesses, or merely of his entire interest, is to make an assignment of his term; and, therefore, if he *subsequently* acquire the interest of the original owner (the reversion), he takes the position of a reversioner. The lease was void as to the excess; valid as to the interest owned when the lease was made.‡ But neither he nor the lessee can say that the former had no interest when the lease was granted; and if, in fact, the lessor had no interest at the time, he of course cannot say the lease exhausted his right.

But, in a late case,§ the Court of Appeals, in New York, have placed a construction upon what has often been said and repeated by Kent, in 4 Cowen, *supra*, namely: "If the lease take effect by passing an interest, it cannot operate by way of estoppel, even though it cannot operate by way of interest to the full extent of

American edition of White & Tudor's Eq. Cases, 72; Law Lib., 202, and cases cited; Mastin v. Marlow, *supra*.

* Trevisan v. Lawrence, 1 Salk., 276; 2 Preston's Abstracts, 210; Bigelow, Estop., 328, and cases cited; Hermon, Estoppel, same subject.

† Bigelow, Estoppel (notes).

‡ Ibid., 331-2, cases cited; Chancellor Kent, in 4 Cowen, 98.

§ House v. McCormick, 57 N. Y., 310 (decided in 1874).

the intention of the parties. If any interest, however small, passes by a deed, it creates no estoppel.”*

The court, in this case, takes the position that, while this doctrine is true as to leasehold estates, it is untenable as to the common-law conveyances with warranty; the estoppel applies against the grantor as to the after-acquired interest, as well where he had an interest as where he had none. The court say that, while the last remark of Judge Kent (above quoted) apparently applies to a deed as well as leases, from the connection in which it is used, it was intended to apply to a lease only.

To sustain this view, a quotation, as follows, is taken from Williams, in his treatise on Real Property: “The circumstance that a lease for years was, anciently, nothing more than a mere contract, explains a curious point of law relating to the nature of leases for years, which does not hold with respect to the creation of a greater interest in land. If a man should, by indenture, lease lands, in which he had no legal interest, for a term of years, both lessor and lessee will be *estopped* during the term, or forbidden to deny the validity of the lease. This might have been expected. But the law goes further, and holds that, if the lessor should, at any time during the lease, acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly-acquired estate of the lessor, and shall become, for all purposes, a regular estate for a term of years. If, however, the lessor has, at the time of making the lease, any interest in the land he lets, such interest only passes, and the lease will have no further effect by way of estoppel, though the interest, purported to be granted, be really greater than the lessor had at the time of the grant, . . . but if, in such case, the lease was made for valuable consideration, equity would oblige the lessor to make it good out of the interest he has acquired.”

The court, in *House v. McCormick*, then say: “It may, also, be conceded that there will not be an estoppel, so as to give a grantee the benefit of a subsequently-acquired estate, where any interest passes under a deed of bargain and sale, or quitclaim, or by any conveyance containing no covenant; but the rule or

* Williams, Real Prop., 578. As for a general discussion of the doctrine of estoppel, see *Taylor v. Shufford*, 4 Hawks (N. C.), 116. -

exception claimed does not apply where the deed, by which the premises were conveyed, contains express covenants of warranty or quiet enjoyment. The question in such cases, as in all other cases arising out of the construction of deeds, is one of intention, and where it appears to have been the object of the covenant to assure to the grantee, or covenantee, the full and absolute enjoyment of the property, without any right of the grantor to divest or interfere with the possession at any time thereafter, there is no reason or principle why it should not operate as an estoppel to avoid circuitry of action against a claim of the grantor to a subsequently-acquired estate, where a present right or interest, in fact, passed at the time the grant was made, as well as when nothing whatever passed." This opinion strips the question of much technical reasoning, and accords with reason and sound philosophy, which pervade the whole doctrine of contracts, and with the rules which illustrate the doctrine of estoppel, either in law or equity. If the simple, practical and universal rule can be gathered, without its entanglement with ancient and now obsolete doctrines, and without so much "curious learning," the profession will have gained much, and justice assured, with more facility, certainty, and satisfaction.*

How the Heir is Bound by the Covenants.—While the heir is estopped from denying his ancestor's covenants, . . . to recover against him, it was necessary that the heir should have assets by descent sufficient to meet the demand, and he was bound by the warranties, covenants, or other specialties of the ancestor, only to the extent of the assets.† And, as only real estate could descend to him, his liability was limited to that, irrespective of any *personal* estate, which he might have received as next of kin. But some of the States have statutes, making the personal estate to descend to him substantially in the same way as real estate, and there it is

* It has been held that during coverture the wife's inchoate right of dower cannot be transferred or released, except to one who already had, or who, by the same instrument, acquires an independent interest in the estate; that, on the death of the husband, her dower-interest does not pass by estoppel by virtue of the conveyance, by which her title vests in the grantee as to all the world. See *Elmendorf v. Lockwood*, 57 N. Y., 322. If, however, the deed of the husband be void for any reason, or set aside, the wife's dower is not barred, although she joined in the deed. *Ibid.*

† *Rawle on Covenant*, 541-542.

treated as assets in his hands equally with real estate.* So, the liability of the heir, by reason of his ancestor's covenants, as Mr. Rawle says, depends, in this country, very much on statutory provisions. There were, however, two requisites to bind the heir.

First. That he be expressly named. Second. He must have assets, as herein explained. It is true that, by the strict common law, prior to its modification and change by statute Edw. I., that of Dedonis, Henry VII., and statute of Anne, the heir was *rebutted* from setting up claim to the land in all cases of warranty, whether lineal or collateral, whether he receives assets or not from the warranting ancestor.†

In the case of *Southerland v. Stout*, *supra*, C. J. Pearson shows that the effect of the statute in that State‡ is substantially the re-enactment of 4 Anne, c. 16, s. 21; but, that the effect of the last clause of sec. 10 (of the N. C. act) was, to make the heir in case of warranties *descending* on him who was entitled to the remainder or reversion, liable as upon a personal covenant for quiet enjoyment.

And this, whether the warranty was lineal or collateral.

In other words, the effect of the statute seems to be that all collateral warranties are *abolished*, and all others are made *void*, but in lieu thereof a *statutory personal covenant for quiet enjoyment* is created, where the assets come by descent and not by purchase. The result of which is, if the heir entitled to the remainder or reversion shall receive real assets by descent, he is bound to pay to the purchaser damages to the amount of the consideration paid for the land in case of eviction by a superior

* Hall v. Martin, 46 N. H., 337; Hartman v. Lee, 30 Ind., 281; Beall v. Taylor, 2 Gratt. (Va.), 532.

† Pearson, C. J., in *Southerland v. Stout*, 68 N. C., 446.

‡ Battle's Revisal, ch. 43, sec. 10 (as cited in the case, "Revised Code, ch. 44, sec. 10"). In this case the heir was held bound by the warranty of the ancestor, as she did not come within any of the statutes making exceptions to the common law.

On the subject of Estoppel generally, see *Moore v. Parker*, 12 Ire., 123; *Taylor v. Shnfford*, 4 Hawks, 130; *Lewis v. Cook*, 13 Ire., 195; *Spruill v. Leary*, 13 Ire., 225; *Myers v. Craige*, Busbee, 169. See the able and exhaustive dissenting opinion of Judge Pearson in *Spruill v. Leary*, p. 408, 13 Ire. Eq.; which last case is *expressly* overruled in the case of *Myers v. Craige*. In *Moore v. Parker* the statute was said to apply.

title, in lieu of "other land of equal value." See *Moore v. Parker*, in the note.

In the case of *Myers v. Craige*, the question of the effect of the warranty* of the taker of the first fee, under a conditional limitation or executory devise, by which a fee is limited after a fee, was decided against the power of such warranty to bar the taker of the second fee without assets descended, the taker of the second fee being the heir at law. And the decision is based upon the law and reasoning as shown by C. J. Pearson, in his dissenting opinion to *Spruill v. Leary*.†

The Rights of the Purchaser bona fide of the After-acquired Title.—This presents the contests which may arise between the grantee before and the grantee after title acquired.

The effect of the estoppel, and the reasons therefor, as between vendor and vendee and their heirs, have already been noticed, but it not unfrequently happens that the bargainor, after obtaining the title, conveys to another party, which party may be a *bona fide* purchaser in the sense hereafter defined in the chapter on Notice.

To determine this question, Messrs. Bigelow, Hermon, and Rawle, have gone into the discussion of the nature of title by estoppel under existing modes of conveyance, as compared with what might be called the transcendent power of estoppel resulting from the old common-law conveyances, such as feoffment, for instance. It was said of the feoffment, that it "passeth the present estate of the feoffor, and not only so, but barreth and ex-

* *Definition.*—*Warranty*, a promise or covenant by deed, made by the bargainor, for himself and his heirs, to warrant or secure the bargainee and his heirs against all men, for the enjoying anything agreed on between them.

A warranty in deed is either *lineal* or *collateral*. A *lineal* warranty is a covenant real annexed to the land by him who either was owner of or might have inherited the land, and from whom his heir, lineal or collateral, might possibly have claimed the land as heir from him that made the warranty.

A *collateral* warranty is made by him that had no right or possibility of right to the land, and is collateral to the title of the land. 1 Inst., 370; Potts Law Dic., 608.

A warranty *in law*, or an implied warranty, is when it is not expressed by the party, but tacitly made and implied by the law. 1 Inst., 365; Potts Law Dic.

† *Myers v. Craige*, Busbee Law, 169; *Spruill v. Leary* (the case overruled), 13 Ire., 225. The dissenting opinion to same case is on page 408 of the same report.

cludeth him of all present and future right, and possibility of right, to the thing which is conveyed.”*

The authorities cited show the effect of this estoppel to be,—“it adheres to the land, is transmitted with the estate, it becomes a muniment of title, and all who afterwards acquire the title take it subject to the burden which the existence of the fact imposes on it.” Mr. Rawle very forcibly and pertinently remarks in regard to this transcendent power of estoppel: “Such a course of decision, if logically followed, leads to the result that the after-acquired title vests in the grantee, not only as against the grantor and his heirs, but as against a subsequent purchaser from the latter of the after-acquired title.” The same author proceeds: “It need hardly be repeated, that this application of the doctrine of estoppel cannot be held to rest on the preventing of circuitry of action, as the *assignee* of the covenantor could never be liable to the prior covenantee, or to any one claiming under him. And the result itself, when applied to the case of a *bona fide* purchaser, without notice, cannot harmonize with the spirit of the Registry Acts in force in this country, and leads to the position, which cannot certainly be considered as tenable, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (without title) to any other person, for, if he have, that person will, according to this doctrine, hold the estate as against this purchaser; and, if the property has passed through several hands, a similar search must be made with respect to every one through whose hands the title has passed.”† This doctrine will not stand the test of experience, and is directly opposed to the beneficent doctrine of equity as applied to *bona fide* purchasers under all systems of equity. As has been said, “it necessarily

* Touchstone, 204; Bigelow, Estop., page 348-380. See the American Law Review for January, 1875. Mr. Rawle calls it a contest between the purchaser and subsequent purchaser from the same grantee: Rawle on Covenant, 427, cases cited in note 1, page 427.

† Rawle on Cov., pp. 428-9. This view of Mr. Rawle was repudiated in Massachusetts after a thorough argument: *White v. Patten*, 24 Pick., 324. The authorities cited, however, were those which arose under *leases*. See Rawle Cov., p. 418 (note 1). The same view was taken in *Jarvis v. Aikens*, 25 Vt., 635. See also *Douglas v. Scott*, 5 Ohio, 198.

tends to give to a vendee, who has been careless enough to buy what the vendor has not got to sell, a preference over subsequent purchasers who have expended their money in good faith, and without being guilty of negligence."

But in the more recent cases decided since these suggestions were made, the courts have distinctly held that, as against the subsequent purchaser *without notice*, the after-acquired title does not inure to the grantee.*

The reasonable view was taken, in the case of *Chew v. Barnet*, by Gibson, C. J., of the Pennsylvania court, in which it was said: "The facts presented constitute the ordinary case of a conveyance before the grantor has acquired title, in which the conveyance operates as an *agreement* to convey, which, when the title has been subsequently acquired, may be enforced in chancery."†

Then, as a matter of course, this *agreement* to convey would not be enforced against a subsequent purchaser without notice. It is thus resolved into a contest as to the priority of titles depending upon well-defined principles of equitable jurisprudence. Mr. Rawle refers to the case of *Register v. Rowell*,‡ of North Carolina, and others, as contrary decisions, and says they place it upon the grounds that the "warranty ceased when the estate to which it was annexed was determined."

But it is suggested that the class of cases which he was discussing is, where *no title or interest* passed; in the case of *Register v. Rowell*, the party making the covenant had a *life estate*, and the warranty was held coextensive with the estate or interest actually owned. This is not a case, therefore, where the doctrine of *bona fide* purchaser is involved.

* Judge Hare, note to *Duchess of Kingston's case*, 2 Smith's Lead. Cas. (7th ed.).

† *Bivins v. Vinzant*, 15 Ga., 521; *Way v. Arnold*, 18 Ga., 181. In this latter case the court of Georgia were inclined to the opinion that the registry acts, under the modern form of conveyancing, were a virtual repeal of the doctrine of estoppel. See *Faircloth v. Jordon*, 18 Ga., 352; *Burke v. Beveridge*, 15 Minn., 206; *Chew v. Barnet*, 11 Serg. & Rawle, 515; *Rawle on Cov.*, 432-36 (notes); *Bigelow Estop.*, 348-380.

‡ *Register v. Rowell*, 3 Jones Law, 312. This case is drawn from the doctrine of *Seymore's case*, 10 Coke, 96; *Lewis v. Cook*, 13 Ire., 193. In this last case it is held that the purchaser at sheriff's sale gets the benefit of all covenants annexed to the land. In accord, *Markland v. Crump*, 1 D. & B., 94.

The statute of uses has effected a radical change on the effect of the warranty in the deed of bargain and sale. The reasons given by Mr. Bigelow for the power of estoppel under the feoffment, fine, lease, etc., are quite convincing, but such is not the effect of the bargain and sale under the statute of uses. Under the estoppel growing out of the old common-law conveyance, the effect was said to result in passing the after-acquired estate to the vendee at the moment of its acquisition ; this being so, the subsequent purchaser from the same vendor would take nothing, whether he purchased with notice or without, and the court could furnish no remedy.

But, as the law now stands, while as between the bargainor and bargainee and their privies, the estoppel may operate completely to the extent shown in this chapter and by the authorities cited, when the rights of third parties attach, as in the case of a second *bona fide* purchaser from the same vendor, a different result must follow. Fraud may bind all the parties *in pari delicto* ; the deed of the fraudulent vendor may pass the title to the fraudulent vendee, but not as against creditors and *bona fide* purchasers. It is simply the case of purchaser for value and without notice, who has first obtained the *legal* title which he will hold against the prior equity, which the first vendee may have. This rule will be fully explained in another chapter.

If this is not so, the effect of the warranty in the deed of bargain and sale carries with it the same uncontrolled power of the feoffment, fine, or other common-law assurance of title, inasmuch, that the registry laws are a nullity in this respect, and the *bona fide purchaser* is without relief, when confronted with this omnipotent title by estoppel.

The proposition might be stated thus : A. sells land to B. ; subsequently A. sells the same land to C., each with warranty.

When the deed was made to B., the vendor, A., *had no title*, but when he made the deed to C., he was the *owner*.

Now, what shall be the effect ? Shall the deed made when A. *had no title*, pass the title to B., while the deed made to C. when A. *had title*, shall pass nothing ?

In reply, it may be admitted that B. took *nothing* by his deed, but he takes the title through the *estoppel*, and this, then, is the

case of two parties obtaining the *legal* title, or what purports to be the legal title, and the first in time is the better.

It is sufficient to say that such is not the power of the warranty in the modern conveyances of this country. In the view of a court of equity, *laches* might be attributed to the party who took the deed when the maker thereof had no title, while superior diligence might be awarded to the party who buys when the maker of the deed *has* title, not to mention the doctrine of *bona fide* purchaser.

CHAPTER XIII.

ESTOPPELS, AS APPLIED TO MARRIED WOMEN.

As the married-women's acts have so greatly modified the *status* of the married woman, it is thought a more extended reference to the doctrine of estoppels, as applied to married women, is important. A few general principles will be noticed. In the October-November number of the *Southern Law Review*, Seymour D. Thompson, Esq., in an elaborate article on this subject, asserts the following four propositions, and cites authorities to sustain each :

"I. In those cases where the wife is disabled by law from contracting, she cannot be estopped in consequence of *attempting* to make a contract.

"II. But in those cases where she has capacity to contract, she may suffer an estoppel by matter resting in contract the same as a person who is *sui juris* may.

"III. In cases where her husband acts as her agent in the care of her realty, or in the care and disposal of her personalty, she will be estopped by his contracts relating thereto, unless she disaffirms the same at the time.

"IV. She may suffer an estoppel, in consequence of her conduct *in pais*, in like manner as if she were sole."

Under the first general proposition, it is well established that,

as the law stood before recent legislation, and as it now stands in the absence of such statutes, the wife is not liable for a breach of covenant of warranty in her deed, though she is estopped by her covenants of warranty.

This is the general doctrine now held in the United States. By the estoppel of the wife, when she makes a deed with covenants, she cannot afterwards assert title to the same land, or deny that she had title at the time she made the conveyance, nor can anyone, claiming through her. And, although she may not have a good title at the time of the deed, the after-acquired title will inure to the benefit of the grantee.

The after-acquired title *feeds the estoppel*.

In other words, the title passes, not because the *feme covert* has the power to convey, but the title passes by *estoppel* against the wife.*

In some of the cases we find a contrary expression of opinion, namely, that a deed executed by a *feme covert* in conjunction with her husband does *not* operate as an estoppel with reference to her after-acquired interest in the same land.† This is understood, of course, as a deed with warranty conveying the wife's *own* lands, and not the joining in the husband's deed to convey *his* land, for we have seen, in discussing the question of Dower, that the joining in the husband's deed simply *estops* her from setting up dower in the same lands; that, as to the *title*, she is not estopped from setting up a subsequently acquired title to the same land.‡

As stated, the covenants of the husband's deed do not operate as an estoppel on the wife as to the title.

Now, the fact that the local statute requires the husband to give his assent in writing, or by joining in the deed conveying the wife's land, does not make it any the less the *wife's deed*. The law requires *his* assent to serve a purpose of justice, as is

* Grant v. Townsend, 2 Hill, 554; Falmouth Bridge Co. v. Tibbotts, 16 B. Mon., 637; Porter v. Bradley, 7 R. I., 538; Sawyer v. Little, 4 Vt., 414; Fowler v. Shearer, 7 Mass, 14, 21; Fletcher v. Coleman, 2 Head., 384; Rawle on Cov. Title, 429; Nash v. Spofford, 10 Met., 192.

† See Jackson v. Vanderheyden, 17 Johns., 167; Grout v. Townsend, 2 Hill, 554; Hopper v. Demorest, 21 N. J. L., 525; Carpenter v. Shermerhorn, 2 Barb. Ch., 314; Bartlett v. Boyd, 34 Vt., 256.

‡ Blaine v. Harrison, 11 Ill., 384; Griffin v. Sheffield, 38 Miss., 359, 392.

supposed, but this should not change the doctrine of estoppel as to the wife.

The statute of Indiana provides that "the joint deed of the husband and wife shall be sufficient to convey and pass the lands of the wife, but not to bind her to any covenant therein."* This statute was intended to change the common-law view, and instead of the bargainee taking by estoppel against the married woman, he takes by the deed as though she was not under disabilities. But the latter clause of the act was, perhaps, intended to affirm what was the general rule of law before, namely, that the wife could not be sued on her covenants of warranty. It should not be forgotten, however, that in New York, and in others of the States, the wife is made liable in damages for a breach of covenant of warranty, and may be compelled to specifically perform a contract in reference to land.

But for the present we speak of the law without reference to statutory changes. Under the rules of the common law she is not *estopped* by her *agreement*. It would be absurd to say that a party was absolutely disabled from making a contract, and at the same time hold that an attempted contract, though void as a contract, is good by way of estoppel.†

We might take the summary ideas under this first general proposition as taken by the writer thereof:

1. The married woman is not estopped by her agreements.
2. Not estopped by recital or representation that she is covert.‡
3. A corresponding doctrine in case of infancy.§
4. But a single woman is estopped to deny coverture.||
5. Cannot lose title to her lands by estoppel springing out of a contract.¶

* 1 Gav. & Hord, Ind. Stat., 258; Davis v. Bartholomew, 3 Ind., 485; Kinnaman v. Pyle, 44 Ind., 275.

† Todd v. Pittsburgh & C. R. Co., 19 Ohio St., 514, 526; see also Purcell v. Goshorn, 17 Ohio, 105; Mitchell v. Dunlap, 10 Ohio, 117; Miller v. Hine, 13 Ohio St., 565.

‡ Dempsey v. Tylee, 3 Duer, 73, 100; Lowell v. Daniels, 2 Gray, 161; Keen v. Coleman, 39 Penn. St., 299; this rule was denied in Illinois, see Patterson v. Lawrence, 90 Ill., 174; compare Oglesby Coal Co. v. Pasco, 79 Ill., 164.

§ Conroe v. Birdsall, 1 Johns. Cas., 127; Brown v. McCune, 5 Sandf. (S. C.) 224; Houston v. Turk, 7 Yerger, 13; Brown v. Dunham, 1 Root, 227.

|| Mace v. Cadell, Cowp., 232.

¶ Story's Eq. Jur., sec. 139; Lowell v. Daniels, 2 Gray, 161; Behler v. Weyburn, 59 Ind., 143; Wood v. Terry, 30 Ark., 385.

6. Wife's informal conveyance or contract to convey not enforceable in equity.*

7. No estoppel in favor of one who has made improvements in good faith.†

8. But husband and wife may recover in ejectment.‡

9. And so may the heirs of the wife.§

10. Or, she may afterwards sell the land to a third party by deed properly acknowledged.||

11. Nor will action lie against her and her husband for such a fraud.¶

In reference to the last proposition, that no action will lie against a married woman and her husband for a fraud of the wife, growing out of the *contracts*, it has been said, in a Kentucky case,** "that a fraud committed by a married woman may vitiate a sale made by her, and authorize a rescision of the contract, if properly sought; and it may operate to estop her, in many instances, from avoiding a sale or conveyance of the property. But the court say that the principle of this doctrine is not applicable to cases in which a recovery is sought in a joint action against husband and wife, for fraud practiced by her in a sale of her general property. Though a *feme covert* may be guilty of a tort, either separately or jointly with her husband, yet she cannot be

* *McDaniel v. Grace*, 15 Ark., 465; *Stillwell v. Adams*, 29 Ark., 346; *Wood v. Terry*, 30 Ark., 385; *Huff v. Price*, 50 Mo., 228; see also *Whitley v. Stewart*, 63 Mo., 360; *Stephens v. Parish*, 29 Ind., 280; *Glidden v. Strupler*, 52 Penn. St., 400; *Petit v. Fretz*, 33 Penn. St., 118; *Story's Eq.*, sects. 64a, 3, 96, 97, 177, 243.

† 3 *Watts*, 238; 7 *Watts*, 394.

‡ *Rumfelt v. Clemens*, 46 Penn. St., 455; *Glidden v. Strupler*, 52 Penn. St., 400.

§ *McClure v. Douthitt*, 6 Penn. St., 414.

|| *Kirkland v. Hepsegefser*, 2 Grant Cases, 84.

¶ *Owens v. Snodgrass*, 6 Dana, 229; *Keen v. Hartman*, 48 Penn. St., 497; *Keen v. Coleman*, 39 Penn. St., 299; 6 *Bush.*, 681; *Hill on Torts*, 590.

** *Curd v. Dodds*, 6 *Bush.*, 681. The reason of the rule stated above is said to be this,—it would be nothing more than another way of removing her disabilities and giving effect to contracts. In respect of actions against a husband and wife for the *torts* of the wife there is this distinction: such actions are only maintainable in cases of pure and simple *torts*, or what are sometimes called *torts simpliciter*, and not where the substantive basis of the fraud is the *contract* of the wife. See *Owens v. Snodgrass*, 6 Dana, 229; also *Adelphi Loan Assn. v. Fairhurst*, 9 *Exch.*, 422.

precluded from relying on her coverture as a bar to legal liability for fraud committed by her in a contract which her disability made void. And this is true, generally, where the fraud is directly connected with a contract of the wife, and is the means of effecting it—a part of the same transaction.”

Ratification during Coverture.—It is said that it is obvious that a contract which a wife is disabled from making, she is disabled from ratifying during coverture. This rule has attempted to be extended further; that is to say, the contract being entirely void, cannot be ratified even after coverture. But there would be a moral obligation connected with this void contract sufficient to support the subsequent making of a good contract, having the same effect as in the case of a married woman selling her land for an adequate price and receiving the purchase-money, and through ignorance of the parties making a deed thereto without the joinder of the husband, or which is otherwise not in compliance with the statute enabling married women to convey. This deed is void, and, upon the principles stated, will not operate as an estoppel.

In this case she may make a good deed, but this would not be a ratification of the old contract, but a new contract.

Deed of Married Women Who are Minors.—The general doctrine is that the deed of a minor is only *voidable*, while that of a *feme covert* made not in pursuance of law is *void*. On coming of age it is a personal privilege of the minor and his heirs to *avoid* the contract, or elect to ratify it. If the wife execute the deed contrary to the requirements of the law it is *void*, but is void on account of *coverture*, and not *infancy*,—yet she is an infant also. On the other hand, if the deed is made in complete accord with the law as to married women, then it is valid as to the *feme covert*; but, being an infant, it is voidable, and she may avoid it when she becomes of age.

On coming of age, although a married woman, circumstances may arise *in pais*, which will estop her from avoiding the deed. Thus in a case in Indiana,* where the land of an infant *feme*

* *Scranton v. Stewart*, 52 Ind., 68. As to the void deed of a *feme covert*, and the voidable deed of the infant, and for the doctrine mentioned in the text, consult *Law v. Long*, 41 Ind., 586; *Miles v. Lingerman*, 24 Ind., 385; *Bool v. Mix*, 17 Wend., 119; *Webb v. Hall*, 35 Me., 336; *Greenwood v. Coleman*, 34

covert was thus conveyed, and a large portion of the purchase-money being paid to her husband after she became of age, to her knowledge, and without any act or expression of disaffirmance, it was held that she was estopped to disaffirm after the expiration of three and a half years.

There are some cases in the books where the wife was held estopped by the joint action of herself and husband. Thus in Pennsylvania,* where suit was brought against husband and wife on a mortgage of the wife's lands, the husband employed counsel to appear and confess judgment for both, the wife was held estopped, although the title had not been made according to the statute giving her power to convey. But this does not appear consistent with the policy as declared in that same case and in subsequent cases in the same State, especially in *Glidden v. Strupler*.†

Estoppel on Her when she receives the Consideration.—There is a want of uniformity in the decisions on this point. It was said in a Pennsylvania‡ case, already cited: "In the first place, the receipt of the consideration by a married woman is no ground for the interposition of equity. If it were, then in no case where a *feme covert* has received a *quid pro quo* would her legal incapacity protect her." "It would be but technical, and, like a penalty, would be relieved against. This would be a flat denial of a legislative policy, founded on the most important reasons, entering into the very constitution of society; and social order must lie at the feet of chancery." In another case§ they say: "It would work a repeal of our old statutes of conveyancing." Notwithstanding this strong language, and the plausibility of the general reasoning on this point, in Mississippi,|| where the wife

Ala., 150; *Cord v. Patterson*, 5 Ohio St., 319; 12 Mo., 549; 3 Paige, 117; 16 Wend., 617; 1 Denio, 329; 5 J. J. Marsh., 114, 120; 1 B. Mon., 76; *Kendall v. Lawrence*, 22 Pick., 540; 13 Mass., 237; 40 Ind., 148.

* *Evans v. Meylent*, 19 Penna. St., 402; in accord, *McCullough v. Wilson*, 21 Penna. St., 436.

† *Glidden v. Strupler*, 52 Penna. St., 400, 403. See, in accord, *Petit v. Fretz*, 33 Penna. St., 118.

‡ *Glidden v. Strupler*, 52 Pa. St., 400. § *Petit v. Fretz*, 33 Pa. St., 118.

|| *Shivers v. Simmons*, 54 Miss., 520. The doctrine that an act void cannot be made good by ratification does not apply to void judicial sales. See *Freeman's Void Judicial Sales*, sec. 48.

had exchanged lands, the deed by which she parts with her land is void, though she receives a good deed for the land which she gets in exchange; but she entered into possession of the land received in exchange, enjoyed it for a while and then sold, and with the proceeds purchased other land; it was held that after the lapse of nine years she could not recover the land she parted with in the first instance. If she receive the consideration under a judgment that is void, it has been held that she will be estopped from reclaiming it. This was said also in *Shivers v. Simmons*.

This is certainly the rule in regard to judicial sales of property of persons who are *sui juris*.* It was suggested in *Smith v. Warden*, that the rule does not proceed upon any supposed distinction between void and voidable sales; but, the reason is, that a receipt of the purchase-money, with knowledge that the purchaser is paying it upon an understanding that he is getting a good title, *touches the conscience*, and therefore binds the right of property in the one case as well as the other. Why should not the same principle apply to all private transactions? Acts of the legislature provide *how* a married woman may pass title to her estate; this is done for *her* protection. And a court of equity could not substitute another *mode* of conveyance; but is it necessary to protect the *feme covert* that she should commit *fraud* on others with impunity? Has a court of equity no power to relieve against fraud, simply because the individual labors under some *egal* disabilities as to *contracts*?

And certainly, in the United States, at this time, the relations of married women to business and property of the country forbid the policy of disturbing *executed* contracts made by them, when the transaction is fair and free from imposition or fraud.

Where a Married Woman may Contract, she may Suffer an Estoppel.—As,

1. Where she has the power to contract generally.

* *Crowell v. Meconkey*, 5. Penn. St., 168; *Sittig v. Morgan*, 5 La. An., 574; *Stroble v. Smith*, 8 Watts, 280; *Southord v. Perry*, 21 Iowa, 488; *McLeod v. Johnson*, 28 Miss., 374; *The State v. Stanly*, 14 Ind., 409; *Headen v. Onbre*, 2 La. An., 142; *Smith v. Warden*, 19 Penn. St., 424, 430; *Southern Law Review* for Oct. and Nov., 1882, p. 299.

As to the reasons for holding the wife to her acts, which, to repudiate, results in fraud, see late cases already noticed: *Patterson v. Lawrence*, 90 Ill., 174; *Norton v. Nichols*, 35 Mich., 148; *Godfrey v. Thornton*, 46 Wis., 677, 690.

2. Where she is allowed to act as a free trader.
3. Or where the contract is in regard to her separate property.

The argument has already been made, that the reason why a married woman cannot be estopped by her *attempted* contract is, that she has no power to make the particular contract. The converse of the rule is certainly true, that where she has the power by law to make the particular contract, there she may suffer an estoppel.* By the statute of New York† the wife may become a *sole trader*, and under the statute of North Carolina she may become a *free trader*. These acts give her power to contract to the extent limited, and she may suffer an estoppel.

In reference to her separate estate it will be seen, from what is said in the chapter on the wife's separate estate, to what extent she may contract. It has been held, in some of the States, that she is liable for frauds committed in respect to her separate estate, either in person or by her agent.

Mechanic's Lien on the Wife's Realty.—In those States where the wife is authorized to deal with reference to her separate estate as if she were sole, she may be estopped as against a mechanic's lien from simple acquiescence and acceptance of the benefits of the improvements. If she stand by and see valuable improvements made under the belief that the property belonged to the husband, she will be estopped from denying the lien on her separate estate thus improved and benefited by her knowledge and acquiescence.‡ But where the mechanic knows the land to be that of the wife, as if she owned it in fee at common law, and he not seeking to make a contract with her, and being a case where she can contract only under the statute, she cannot be bound by mere acquiescence; the lien cannot be asserted against her. In

* *Bodine v. Killen*, 53 N. Y., 93, 96; *Nash v. Mitchell*, 71 N. Y., 199; *Nixon v. Halley*, 78 Ill., 611; *Musser v. Hobart*, 14 Iowa, 248. But this could well be under the statute. See Rev. Code Iowa, 1873, sec. 2202.

† N. Y. Laws, 1862; *Battle's Revisal*, ch. 69, secs. 19, 21, 22. As to other instances of the wife's power to contract, see *Roland v. Logan*, 18 Ala., 307; *Cobine v. St. John*, 12 How. Pr., 333; *Ex parte Franks*, 7 Bing., 762; *Elwell v. Chamberlain*, 31 N. Y., 611; *Smith v. Tracy*, 36 N. Y., 79.

‡ *Schwartz v. Saunders*, 46 Ill., 18; *Anderson v. Armistead*, 69 Ill., 452.

As to charging the wife with mechanic's lien, see *Hauptman v. Catlin*, 20 N. Y., 247; *Yale v. Dederer*, 18 N. Y., 265; *Calvin v. Currier*, 22 Barb., 372; *Collins v. Megraw*, 47 Mo., 495; *Tucker v. Gest*, 46 Mo., 339; 14 Ohio St., 519.

this case it would be a good defence that she did not consent to the improvements.* Perhaps, if she made the contract as agent of the husband, she would be estopped.†

She may be Estopped by the Acts of the Husband and Others, who act as Agent—In what Cases.—It is only in cases where the *feme covert* can contract, that she can appoint an agent, for what the law disallows her to do herself, she cannot do by another, the general rule being that a married woman cannot appoint an agent or attorney. In cases where this general rule applies, she cannot, on principle, be estopped by the acts of the husband, or others who attempt to act for her. But in matters where she is authorized to act for herself, she may appoint an agent to act for her, and she will be estopped by his acts in like manner as a person *sui juris*. And, also, in cases of this kind, if the agency or act be unauthorized, her conduct, acquiescence and the enjoyment of the benefits, after knowledge of the same, may conclude her, though stronger evidence might be required to establish a ratification by her than would be required in case of a person *sui juris*. We have seen, while discussing the doctrine of the liability and mode of charging the *separate* estate, that where the contract relates to or is for the benefit of the estate, the wife is chargeable. This being so, the husband or other agent can make a contract for her, it being nothing more than what she could do herself. Several New York cases have decided this question, although it is held that the Act of 1848–9 did not operate to remove the general disabilities of the wife.‡

If she engage in trade, and holds her husband out to the world as her agent for the conducting of such trade, she is bound by his acts within the scope of his authority.§ Nor is it necessary that

* *Hughes v. Peters*, 1 Cald., 67; *Bliss v. Patton*, 5 R. L., 376, 380; 27 N. J. L., 239; *Morable v. Jordan*, 5 Hump., 417; 24 Iowa, 584; *Barto's Appeal*, 55 Penn. St., 386.

† *Rogers v. Phillips*, 8 Ark., 366; 6 Mo., 164; 13 Metc., 149; 15 B. Mon., 80; otherwise, if made before marriage of the wife, *Caldwell v. Asbury*, 29 Ind., 451.

‡ *Yale v. Dederer*, 18 N. Y., 265; *Barton v. Beer*, 35 Barb., 78; *Frecking v. Rolland*, 53 N. Y., 422; 68 N. Y., 400; 53 N. Y., 93; *Owen v. Cowley*, 36 N. Y., 600; 55 N. Y., 247; 54 N. Y., 652. Otherwise, if outside of this limit, 58 N. Y., 80.

§ *Bodine v. Killen*, 53 N. Y., 93.

the husband, so contracting, should disclose the fact that he is contracting for his wife, if it be shown that the contract was for the benefit of the estate, with her knowledge, and by her authority. Neither will it matter if the contract be in the name of the husband. It is an elementary principle that, where an agent contracts in his own name for an unknown principal, such principal is liable upon the contract to the same extent as though the contract were made in the name of the latter.*

But it was held in a case in New York, that the mere fact that a wife knows that the work is in progress upon her separate estate, and does not object, is not, of itself, sufficient to establish an agency in her husband to make a contract for the doing of the work in her behalf, or that the work was done by her employment.† In another case, in the same State, the question was whether a note, given by the wife, was for the benefit of the separate estate; it appeared that the wife owned a farm which was carried on by her husband, who owned nothing; that whatever he purchased went into the mass of the wife's property, so that he was proof against execution; that the wife made the note in question, received the proceeds of it, and handed them over to her husband. These facts appearing, the fact that the husband instead of applying the same to the farm, squandered it, did not make the wife less liable.

The court said: "The very money borrowed became a part of her separate estate by the act of borrowing, and the promise to pay related to her separate estate. Her husband was not liable, and it would be utterly unrighteous if she should be permitted to cheat the plaintiff out of this money."‡ Where the husband acts as agent of the wife in reference to her separate estate, he may charge it with a mechanic's lien.§

As for other instances of estoppel, see the cases in note.|| To

* *Fowler v. Seaman*, 40 N. Y., 592; compare *Ainsley v. Mead*, 3 Lans., 116; *Fairbanks v. Mathersell*, 41 How. Pr., 274.

† *Jones v. Walker*, 63 N. Y., 612 (distinguished from *Hauptman v. Catlin*, 20 N. Y., 247).

‡ *Smith v. Kennedy*, 13 Hun., 9, 10.

§ *Burdic v. Moon*, 24 Iowa, 418; *Kidd v. Wilson*, 23 Iowa, 464.

|| *Dann v. Cudney*, 13 Mich., 239; *O'Brien v. Hilburn*, 9 Texas, 299; *Drake v. Glover*, 30 Ala., 382; October and November number of *Southern Law Review*, 307, 308.

constitute an estoppel by mere silence, the party upon whom it is sought to visit the estoppel must be present.*

As to how far the passive acquiescence of the wife in the acts of her husband will tend to work an estoppel is not very positively decided. There is, perhaps, a difference between remaining passive and silent in regard to her rights generally, and that of passive silence in the *presence* of a transaction, and in the presence of a person who is about to act to his injury on the faith of the representations of the husband.

As to the effect of general acquiescence in the husband's dealings with her property, the case of the United States Bank *v. Lee*,† is important. In this case, Richard Bland Lee, and his wife Elizabeth, resided in Virginia. He was largely indebted to Judge Washington, and he and she joined in a deed whereby she relinquished her right of dower in certain lands belonging to him, in consideration for which the husband conveyed to trustees certain slaves for her separate use.

Subsequently, Lee and his wife removed to the District of Columbia, taking with them the slaves, which remained in his apparent possession with the acquiescence of the wife, and he obtained credit upon their supposed ownership. Some of them he sold to supply the wants of the family, with her like silent consent and acquiescence.

Lee borrowed, in 1817, a large sum of money from the United States Bank, and gave a deed of trust on these slaves to secure the same. Lee died insolvent in 1827, and in 1834 the bank filed a bill against Mrs. Lee and her trustees to compel a surrender of the slaves in payment of the debt. The decree was in favor of the wife and against the bank. And, in reply to the argument of estoppel in favor of the bank, the court (Judge Catron) used this language: "If a party having title to property stands by and sees another deal with it as his own, and does not make his title known under circumstances which require him to do so, that is a fraud which estops him from setting up his title afterwards. How far that principle would apply to a wife standing by and seeing her husband deal with her property, the court does not decide. But Mrs. Lee was only *passive* and *silent*, al-

* Drake *v. Glover*, 30 Ala., 382.

† United States Bank *v. Lee*, 13 Peters (U. S.), 107.

though she may have known that Lee was obtaining credit on the strength of her property. A court of chancery will not hold her responsible because of her silence."

This case was cited, with approval, in a case in North Carolina, in 1874.* In that case, Skinner, who married in New York, and his wife having money as her sole and separate property, by agreement with her he brought the same to North Carolina to invest for her in real estate, and was to take the title in her name. The husband did invest the money in real estate, and took title in his own name, and obtained credit for years on the apparent title to this property. The portion of the land in controversy was levied upon and sold under execution in behalf of the creditors of the husband. On a bill filed by Mrs. Skinner, it was held that the wife's equity was superior to the rights of the creditors of the husband, and that her general acquiescence and knowledge was no estoppel.

The contest in *Hicks v. Skinner* was between the wife and the purchaser at execution sale of the lands, but the court held to the general doctrine established in that State, that a purchaser at execution-sale does not occupy the same ground that a purchaser of the legal title for value and without notice does; the former buys subject to all equities against the defendant, whether he knows of them or not. It was also objected in argument that the property of Mrs. Skinner had lost its identity, and could not be followed; but the court held that a principal who undertakes to follow his money into property, into which it has been fraudulently conveyed by his agent, is not required to show the identical bills of exchange or bank bills which he gave to the agent with directions to pay for certain property. "Fraud cannot so easily evade pursuit." "The principal need only show that he gave money to the agent upon a promise to invest it in the purchase of certain property, and that the agent did afterwards purchase that property and take title to himself. Upon this proof there is a clear equity to follow the property and have it conveyed as it ought to have been." It is true that in this case the court said, "It does not appear when Mrs Skinner first knew that her husband had taken a deed for the lot in his own name;" but still, taking into view that she knew of the sale of certain lots to third parties, and all the facts stated, she was not estopped. But in

* *Hicks v. Skinner*, 71 N. C., 539.

justice to the question of *acquiescence* by a *feme covert*, which we are now discussing, we mention the very pointed dissenting opinion of Judge Bynum in the case of *Hicks v. Skinner*.

There were several questions in the case, but in reference to the question of the estoppel of the wife, he says: "The wife here permitted the husband to use and treat her money as his own, and having thus, by her connivance, aided him in obtaining a false credit, she will not now be heard to say the property was hers to the detriment of honest creditors."

Upon this part of the case the referee has found the following facts: "That the defendant, Annie S. Skinner, permitted her husband to receive from New York, in money, the proceeds of the choses in action which were hers before marriage; that he used the money so received freely and without question by her, and with her assent; that she confided and committed her funds to the control and management of her said husband, upon the general understanding that he was 'to return or reinvest' for her; but the understanding was not in writing, and there was no clear, definite, or specific contract in regard to it, or of the manner in which it was to be done. That the defendant, Thomas E. Skinner, used the fund as his own; that from 1855 to 1861 he invested a portion of it in his own name, and none in the name of his wife; that the general understanding, that he was to return or reinvest it for the wife, was never executed; and that he spent a portion; that during the period mentioned above, and down to the time the defendant, Thomas E. Skinner, was known to be insolvent, no attention was given to the matter by Annie S. Skinner; no notice was taken by her of the same, and no complaint made on account thereof.

"When it is considered that this entire fund consisted of money, the most fleeting and unsubstantial of all property, and incapable of identification; that it was received by him from time to time, through a period of many years, and used by him for every purpose of life, whether of pleasure or profit, and that, too, without question or complaint on her part, to my mind it is difficult to conceive a more complete gift and dedication to his use than is furnished by the simple narrative of the referee above set forth. To hold that the wife can follow the money and fasten an equity upon the thousand forms in which it may have been invested in

the travels of the husband in Europe and America, is absurd and shocking to every idea of free dealing in the commodity of money.

"Yet that is the proposition and that is the equity of Mrs. Skinner in this case. Having allowed her husband to sail under false colors, and to incur debts upon the credit of property to which she had the legal title, she should be estopped now from asserting a claim to the prejudice of *bona fide* creditors."*

In this particular case the argument of Judge Bynum seems difficult to resist; but on this question a writer has said: "But, even if the relation of husband and wife is left out of view, the application of the principle may well be doubted. The fact that A. extends credit to B., upon the faith that B. is the real owner of certain property of which he is the apparent owner, does not give A. a lien on this property. If it were otherwise, the debtor would have no right to prefer his creditors, which all courts concede; nor could he convey the property to one of his creditors in payment of a debt of the full value of the property, which he may, as the law stands, unquestionably do; for any other creditor could prevent this by saying: 'I gave credit on the faith of the debtor being the owner of the property, therefore it must be held for the satisfaction of my debt.' But if, instead of owing A. money, B. holds title to land which he ought to convey to A. what is but a debt, what difference is there in the principle which should govern? When, therefore, it is conceded, as it generally is at the present day, that husband and wife may contract with each other; that the husband may become indebted to the wife, or the wife to the husband; and that, if the husband is indebted to his wife, he may prefer her as a creditor, just as he might if she were a stranger to him, the conclusion that a wife may, if she do no act tantamount to actual fraud, by simply suffering her husband to hold title to her property, lose her right to have it conveyed to her as against his creditors, seems to have no proper foundation for its support. The wife, it seems, must do some affirmative act of a tendency to deceive her husband's creditors, and lead them to suppose that she has no equity in the particular property. If, under such circumstances, the legal title becomes vested in her before her hus-

* Dissenting opinion of Judge Bynum, in *Hicks v. Skinner*, 71 N. C., 558-9.

band's creditor get a lien upon it by virtue of his judgment, she will hold the title as against him."*

Upon the question of estoppel against the wife, in a very recent case in North Carolina,† the court held, under the statute and law of that State, that the "equitable, as well as legal estate in land, vested in a married woman, can be transferred only upon her privy examination, in conformity to the statute, unless the power is given her in the instrument creating the trust; and, when the transfer is not made according to law, the declaration of the husband in her presence, that he had a good title, or her direction as to the appropriation of the purchase-money, will not estop her from asserting a claim to the land."

There are, however, quite a number of recent cases in the American courts which go far to sustain the reasoning of Judge Bynum, from whose dissenting opinion we have quoted. Thus it is held that if the wife own real property, the title to which is not upon record, and the husband enters into a sale of it, of which she is informed at the time, and to which she makes no objection, she will be estopped from setting up title to the same as against the party purchasing from the husband.‡ Also, where the claim of the wife was that the land had been purchased with her money, yet it appeared that the husband had held the legal title for about three years, during which time she took no steps to assert her title or publish it to the world; in the meantime the husband was accepted as a surety on a replevin bond for a party who afterwards became insolvent, and the land was sold under execution against him; it was held that the purchaser took a good deed. She was estopped from setting up her equitable title to the land as against the legal title acquired by the sheriff's sale.§ This case of *Catherwood v. Watson* is directly opposite to the principle decided in *Hicks v. Skinner*.||

In the latter case it was held that a purchaser at execution sale takes subject to all equities, whether he had knowledge of the equities or not, while in the former it appears to be placed upon

* Southern Law Review, Oct. and Nov., 1882, p. 310; citing *Seeders v. Allen*, 98 Ill., 471.

† *Clayton v. Rose*, 87 N. C. (not published); advance sheets.

‡ *Smith v. Armstrong*, 24 Wis., 446.

§ *Catherwood v. Watson*, 65 Ind., 576. || *Hicks v. Skinner*, 71 N. C., 539.

the grounds of two equities being equal, and the party getting the legal title first is protected. But this principle applies to private sales and not to a sheriff sale, in which *caveat emptor* applies. Then, again, it was held in New Jersey,* that where a husband has taken title to real estate in his own name, with the wife's knowledge, and she has permitted him for years to represent the property as his, and, upon such apparent ownership, to obtain business credit and standing, a court of equity will not protect the property from the husband's creditors, even if the design to create the trust in the wife's favor were clearly established by the evidence. So in Illinois† it is held, that if the wife allows her husband to use her capital as his own, to invest and re-invest the same in his own name, and thereby obtain credit on the faith of his being the owner of the property, she could not be allowed to interpose her claim to the property as against the husband's creditors. At another place, reference has been made to the late case of *Patterson v. Lawrence*,‡ in which it appeared that a married woman, who had been divorced from her former husband, held title to real estate in the name which she bore prior to such divorce. By representing herself as a widow, and concealing the fact of her present coverture, she induced a person to make an advance of money upon a deed of trust which she executed in her former name, and without the joining of her present husband.

The party who took the mortgage filed a bill, and it was held that she was estopped by her fraud from setting up her coverture to avoid the debt. This decision is contrary to another rule which we have discussed, namely, that a married woman is not estopped from relying on her coverture, because she made representations that she was a single woman at the time of the contract; the reason given is, that a married woman could abrogate her disability by merely representing herself to be sole. See the cases

* *Besson v. Eveland*, 26 N. J. Eq., 468; *City National Bank v. Hamilton*, 34 N. J. L., 158.

† *Hocket v. Bailey*, 86 Ill., 74. See also *Wortman v. Price*, 47 Ill., 22; *Wilson v. Loomis*, 55 Ill., 352; *Patton v. Gates*, 67 Ill., 164.

‡ *Patterson v. Lawrence*, 90 Ill., 174, 179.

heretofore cited,* which oppose the view taken in *Patterson v. Lawrence*.

In the latter case, however, the husband's right would not have been affected but for the facts indicating his participation in the contemplated fraud.

All these cases have their peculiar features, which commend themselves to the active, conscientious, searching scrutiny of a court of equity. In holding the "scales of justice," it is difficult and often impossible to observe abstract rules, and at the same time mete out to each party that measure of justice deserved. Hence, these courts must very often hold the guilty perpetrator of fraud to the legitimate consequences of his or her act, though that person may be a *feme covert* or an infant. If it is held a fraud for a married woman to receive the consideration-money, and at the same time to insist on holding the land, why not hold her estopped in consequence of any deliberately conceived fraud, which, in its results, works great wrong and loss to others who have acted innocently and in good faith?

The great danger is in not finding the true dividing line, which separates the proper protection to the *feme covert* from the deliberate *conduct* of the wife, which tends to defraud others. For instance, it is quite easy to say that the husband is the agent of the wife. She may have a separate estate, and the near relation of the parties and the multiplied acts and transactions of each may be such that an eager creditor of the husband might infer agency, combination, fraud, etc., yet it may be that in all these varied transactions no thought of fraud entered the brain of the *feme covert*. Her husband may be insolvent, he may assume exclusive control of her property (and if that confidence is what it is supposed to be between husband and wife), she is not apt to *suspect* that any wrong will be done to *others*, because she intrusts him with all her means of support. Neither is it expected that she will publish to the world that her husband is not to be trusted, that he is bankrupt or faithless. It is this *conduct* of a married woman, which is called *passive acquiescence* in the acts of the husband, which works no estoppel, and the justice and fairness of this holding cannot be gainsaid. The wife has vested rights.

* *Dempsey v. Tyler*, 3 Duer., 73, 100; *Lowell v. Daniels*, 2 Gray, 161; *Keen v. Coleman*, 39 Penn. St., 299.

She has been the favorite of both courts of law and equity, the one securing her in *dower*, the other in the *settlement*, while modern legislation has almost abolished all disabilities in order to her complete protection, and it should not be said that all her rights can be forfeited by *conduct* of a dubious character or by artificial rules of estoppel. When it appears that she has deliberately *connived* at fraud, or been guilty of *intentional* fraud to the detriment of others, or when it appears from unequivocal proof that she is attempting to hold property against *conscience*, it is time enough to invoke the doctrine of estoppel *in pais*. In cases of this kind the remedies of a court of equity are completely *adequate*.

The experience of the author has impressed this view as being correct, namely, that if the *agency* of the husband is asserted by an opposing interest, the same should be established by indubitable proof, and that estoppels *in pais* should be held to apply to a married woman with great caution. To use the language of another: "If the wife and the husband's creditors are both innocent, if the husband has done this without the knowledge of the wife, and under such circumstances as do not impute *laches* to her, and if the creditor, not suspecting the wrong which the husband has done, extends credit to him on the faith of his being the owner of this property,—in other words, if the creditor and wife are equally innocent,—then, upon the clearest principles of justice, the property of the innocent wife ought not to be taken away from her, and given to the innocent creditor of the husband, who has committed the fraud."*

Resultant Trust in Favor of the Wife in Land, the Legal Title of which is in the Husband.—It is simple learning that where the husband uses the money of the wife in paying for land, the title to which he takes to himself, a trust will arise in favor of the wife, which a court of equity will enforce.

It is true, also, that a court of equity will not establish a resultant trust in any case, except upon clear and satisfactory proof. This latter rule tends to protect the creditors of the husband, and

* The *Syracuse Plough Co. v. Wing*, 85 N. Y., 421; *Bank v. Hamilton*, 34 N. J. Eq., 158; *Payne v. Twman*, 68 Mo., 339; *Bancroft v. Curtis*, 108 Mass., 47; *Summers v. Hoover*, 42 Ind., 153; *Parton v. Yeates*, 41 Ind., 456; *McLaurie v. Portlow*, 53 Ill., 340; *Seeders v. Allen*, 98 Ill., 471; *Southern Law Review*, October and November, 1882, p. 313, notes.

is a safe rule, especially when it is sought to establish a trust to the prejudice of the husband's creditors. Of this rule it has been said: "Claims of this kind" "should always be regarded with a watchful suspicion, and when attempted to be asserted against creditors upon the evidence of the parties, uncorroborated by other proof, they should be rejected at once, unless their statements are so clear, full, and convincing, as to make the fairness and justice of the claim manifest. Any other course will encourage fraud, and multiply the hazards of most business ventures."*

This is a rule *strictly against the feme covert*, which is different from the rule of estoppel *in pais*, which we have contended should be held *strictly* in favor of the wife. The first case is where the husband has the *legal title*, and this appears of record; in the other, the husband has no title on record, but it is sought to estop the wife by "*conduct*" of an equivocal nature, and thereby effectually fix the title in the husband without a record.

The supposed danger to fraud on creditors, growing out of the effort to establish a resulting trust in the wife has been magnified perhaps from the fact that some very extreme cases have been decided; for instance, it is said by a critic, a case in New York† is reported where a mortgage of a farm for \$4611.32, made by a husband to his wife, was sustained as against existing creditors of the husband, though it rested on no better consideration than that *thirty-four years before* the husband had received \$1366 in money which the wife had inherited from her father, on an understanding between himself and wife that he would some time give her a writing to show for it, and that he had used it to pay for the farm in question, and notwithstanding the law at that time allowed him to reduce his wife's *choses in action* into possession. In Rhode Island,‡ the same reviewer§ of this rule finds a case where a deed from the husband to the wife, through a third per-

* *Besson v. Eveland*, 26 N. J. Eq., 468, 472.

† *The Syracuse Plough Co. v. Wing*, 85 N. Y., 421.

‡ *Steadman v. Wilbur*, 7 B. L., 481. In this case, the Rhode Island judge placed the case on the decision of Lord Eldon, in *Lady Arundell v. Phippe*, 10 Vesey, 139, 151; and although this decision of Lord Eldon is criticised by the writer to whom we refer, yet from the facts in that case the judge decided rightly and justly.

§ Mr. Seymore D. Thompson, in October and November number *Southern Law Review*, 314, 815, 316, article "Estoppels against Married Women."

son, was sustained against the creditors of the husband, on its appearing, according to a verdict of a jury on conflicting evidence, that the wife had, from time to time, as far back as twenty years before the making of the deed, advanced to her husband, out of her separate estate, sums of money sufficient to constitute in the aggregate a sufficient consideration for the conveyance. These may be extreme cases, but this is no reason why the wife's rights should not be jealously guarded.

Purchaser bona fide, and without Notice of the Wife's Equities, is Protected.—The right of a purchaser from the husband without notice of the wife's equity stands upon much higher ground than the creditors of the husband, and if *bona fide*, and for valuable consideration, and without notice, having taken the legal title, he is protected over the claim of the wife.*

If he has notice of the equity before he pays the consideration the purchaser is not protected. As to what is necessary to fix a purchaser with notice will be seen in another place.

Other Cases of Estoppel against the Wife.—We have already argued in case of positive intentional fraud, the wife should not be protected so in case of infancy and coverture combined.† The term "standing by" does not always mean actual presence, but knowledge under such circumstances as to make it the *duty* of the person to communicate it.‡ The following instances, among others, are given in the books: 1. Where she solemnly disclaimed title, in giving testimony in a judicial proceeding.§ 2. Fraudulently permitting her husband to represent himself as the owner of her separate property, and to contract for repairs.|| 3. Where, at a judicial sale of the land to pay the husband's debts, she authorizes the auctioneer to disclaim dower.¶ 4. Knowing the husband insane, and fraudulently fails to disclose the same to one about to contract, and afterwards seeking to avoid the same for her own benefit.**

* *Keller v. Keller*, 45 Md., 269; *Smith v. Armstrong*, 24 Wis., 446.

† *Scranton v. Stewart*, 52 Ind., 68. ‡ *The State v. Holloway*, 8 Black., 45.

§ *Cooley v. Steele*, 52 Ind., 68.

|| *Swartz v. Saunders*, 46 Ill., 18; 69 Ill., 452.

¶ *Connolly v. Branstler*, 3 Bush., 702; but this case is doubted. This is an easy way of parting with dower.

** *Rusk v. Fenton*, 14 Bush., 490.

There is a case from the Georgia court* which illustrates the doctrine of estoppel by the *conduct* of the wife. A married woman having a separate estate, executed a mortgage thereon to secure the payment of the sum of \$8000 loaned to her, and made affidavit on the back of the mortgage that the money was to be used for the payment of purchase-money due for the property, and it appeared that the money was loaned on the faith of that sworn statement; it was held that she was estopped from controverting it, and hence, the demand being for purchase-money, that she could not have homestead out of the land.

Effect of the Presence and Constraint of the Husband.—While speaking of *passive* acquiescence of the wife to a disposition of her property, it should have been stated that the presence and presumed constraint of her husband has much to do in giving the "*conduct*" of the wife no greater efficacy than as stated. It has already been argued, but it may be stated as a general proposition, "that where a husband makes an unauthorized sale of the wife's property in her presence, her *mere failure* to assert her rights *at that time* will not operate as an estoppel such as will prevent her from subsequently asserting them." It finds its analogy in the rule that the husband is liable solely for the torts of the wife committed in his presence.†

This last-mentioned rule proceeds on the natural presumption that in such cases the wife acts or fails to act in consequence of the coercion of the husband. Indeed, it is inconsistent with the view which the law takes of the marital relation to require the wife to interpose under such circumstances. This natural presumption may be repelled by evidence which shows that she acted or failed to act independently of such restraint, thereby showing fraud in fact: *Drake v. Glover, supra*.

The discussion of the "*conduct*" of the wife, as coming within the above rules, contemplates the cases where the wife has full power over the property as if sole.‡ For "if a married woman

* *Lathrop v. Soldiers, etc., Assn.*, 45 Ga., 483.

† *Drake v. Glover*, 30 Ala., 390; *Hicks v. Skinner*, 71 N. C., 539; *McIntosh v. Smith*, 2 La. An., 756; *Palmer v. Cross*, 1 Smed. & M., 48, 68; *Bank of the United States v. Lee*, 13 Peters, 107, 121.

‡ *Jackson v. Hobhouse*, 2 Merivale, 482. See *Rangeley v. Spring*, 21 Me., 130, 138.

is not estopped to assert her title to real estate, of which she has attempted to divest herself by a solemn instrument of writing, which is void because not executed in the particular mode pointed out by statute, she cannot, for much stronger reasons, lose her title by a mere passive acquiescence in an adverse claim or user, where her conduct involves no element of fraud. Thus acts *in pais*, which work a dedication to public use of the land of a person *sui juris*, will not have this effect in a case of lands held in fee by a married woman.”*

CHAPTER XIV.

PURCHASER WITH NOTICE—THE DOCTRINE OF NOTICE— PRIORITIES.

It is not the purpose of the author to indulge in an extended and thorough discussion of the doctrine of notice, but simply a brief reference to this very important question as it affects a *purchaser* of some interest in *real property*. Of course the same rules in many instances may apply to property other than real. On the subject of notice, the student is advised to read the following recent works, namely: Wade on the *Law of Notice*, published in 1878; and the chapters on that subject to be found in the second volume of Pomeroy's *Equity Jurisprudence*, an admirable and exhaustive work, issued within the last few months (1881).

In this work Mr. Pomeroy has devoted much space to the discussion of the doctrine of notice, and the question is most elaborately and scientifically treated in all of its ramifications, beginning with § 591 of vol. ii. and extending over many pages.

Notice might be divided into two kinds:

* Oct.-Nov. No. Southern Law Review, 1882, p. 325. Cases cited to same point: *McBeth v. Trabue*, 69 Mo., 642, 657; *Todd v. Pittsburg, etc., R. Co.*, 19 Ohio St., 514, 525; 30 Ala., 382, 390; *Bradstreet v. Pratt*, 17 Wend., 44.

1. *Express*. 2. *Implied*. And perhaps a third class, strictly, might be mentioned as *constructive*, the two last being treated as the same thing.

Express notice might be considered of the highest order of evidence, as that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated. It might embrace what we call *knowledge* of a fact.*

Implied notice, says Mr. Wade, "includes neither positive knowledge nor information so direct and unequivocal as necessarily to carry conviction to the mind of the person notified."

"Neither does it belong to that class which depends upon legal presumption. It is circumstantial evidence from which the jury, after estimating its value, may infer notice. It differs from express notice for the reason that the latter is supposed to be absolutely convincing in itself, while the former merely suggests to the mind of the person to be thereby affected the existence of the fact to which his attention is directed, and points out the means by which he may obtain positive and convincing information.† It differs, on the other hand, from *constructive* notice, with which it is frequently confounded, and which it greatly resembles, with respect to the character of the inference upon which it rests; *constructive* notice being the creature of positive law, or resting upon strictly *legal* inference, while implied notice arises from inference of *fact*."‡ The legislature and the courts sometimes use the word *actual knowledge*. But it is thought that the literal meaning of this expression is not required in any case. Says our author: "*Absolute knowledge*, in the strict sense of the term, imports so high a degree of certainty as to the matter to be established, that to require it in every instance would render the adjustment of differences between man and man, on any just basis, practically impossible. Courts must at best be content with such

* Wade's Law of Notice, ch. i., §§ 5 to 36; Pomeroy's Eq. Jur., § 595; Williamson v. Brown, 15 N. Y., 354; Am. note in 2d Eq. Leading Cases, p. 144 (4th Am. ed.). Says Pomeroy: "Actual notice is a conclusion of *fact*, capable of being established by all grades of legitimate evidence," § 595 (note 4). Speck v. Riggin, 40 Mo., 405; Maul v. Rider, 59 Penn. St. (9 P. F. Smith), 167.

† Citing Farnsworth v. Childs, 4 Mass., 637.

‡ Williamson v. Brown, 15 N. Y., 354; Herman v. Ellsworth, 64 N. Y., 159.

an approximation to perfect knowledge as the natural imperfections of human recollection will afford.”* There should be proof of actual notice of prior title or prior equities, or *circumstances tending to prove such prior right.*†

An instance is given, arising under the registry laws, in which the statute in “terms” required *actual notice* to charge the subsequent purchaser. In order to give precedence to a prior unregistered deed over a subsequent one affecting the same land which is duly recorded, it is necessary to prove that the purchaser had notice of the existence of the prior unregistered instrument. The statute said “*actual notice.*” Does this mean absolute *knowledge*? It has been held, “The test of sufficiency applied to notice in this case, was that it should be so express and satisfactory to the party, as that it would be fraud in him subsequently to purchase, attach, or levy upon the land, to the prejudice of the first grantee.”‡ “The main fact would depend upon inference,” says the same writer, “to be drawn from collateral circumstances.”

In a case where a party purchased land, of which there was a former conveyance and the same was recorded, but the registration was void because of the absence of the necessary certificate to the acknowledgment, and these facts were communicated to the subsequent purchaser by his attorney, whom he employed to investigate the title, it was held, in connection with other facts and circumstances, sufficient to show that the purchaser had notice of the prior deed.§

Of *constructive* notice more will be said when we come to speak of the policy of the registration laws, *lis pendens*, etc.

There is some diversity in the American decisions upon this point. In Indiana and Massachusetts the courts proceed upon the idea that actual notice and actual knowledge mean the same

* Wade's Law of Notice, § 3.

† Brown v. Volkening, 64 N. Y., 76, 83. See 2 Pomeroy's Eq. Juris., § 596, notes 1, 2, with full citation of the authorities.

‡ Wade's Law of Notice, § 9.

§ Wade, § 4, citing *Musgrove v. Bonser*, 5 Oreg., 313; *Hastings v. Cutter*, 24 N. H., 481. In cases of this kind, although *actual* notice is required in terms, “the court or jury infer from the facts, proved by a process of rational deduction, but *without the aid of any legal presumption*, that such information was actually received.” 2 Pomeroy on Eq. Jur., § 495 (notes).

thing.* In *Brinkman v. Jones*† the court was called upon to interpret the Wisconsin statute, which requires "actual knowledge." The court say, "The actual notice required by the statute is not synonymous with *actual knowledge*. We think the true rule is, that notice must be held to be actual when the subsequent purchaser has actual knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with that which he is about to purchase."

When the subsequent purchaser has knowledge of such facts, it becomes his duty to "make inquiry." Thus, it results that *actual* notice is a conclusion of fact, which may be established, like any other fact under the rules of evidence, including circumstantial evidence,‡ all of which the jury must weigh.

As to *express* notice, as Mr. Wade calls it, or *actual* notice, as Mr. Bouvier calls it, but little need be said further, except to say that, where it is attempted to fix the party with direct information, the communication ought to come from those who speak advisedly of the matter, or from information in their possession of a definite character.§ Perhaps, where the means of knowledge are of an inferior sort, the information ought to come from the parties interested.|| It has been held that the statement of third parties, who are ignorant of the facts, will not amount to notice.¶

Says Mr. Wade: "But, when the information comes directly from the party in possession of full knowledge of the facts communicated, and is so full and complete as to all the essential details of the matter as to carry conviction to an ordinary mind, it would properly be classed as express notice, though it stopped far

* *Parker v. Osgood*, 3 Allen, 487; *White v. Foster*, 102 Mass., 375.

† *Brinkman v. Jones*, 44 Wis., 498-521.

‡ *Pomeroy's Eq. Jur.*, § 595; *Barnes v. McClinton*, 3 Penn., 67; *Tillinghast v. Champlin*, 4 R. I., 173. In accord, *Hull v. Noble*, 40 Me., 459; *Rogers v. Jones*, 8 N. H., 264; *Bartlett v. Glascock*, 4 Mo., 62; *Buck v. Paine*, 50 Miss., 648; *Carter v. City of Portland*, 4 Ore., 339. The doctrine of notice is applied very *pointedly* in one of the celebrated *Myra Clark Gaines* cases. See the case *Gaines v. De La Croix*, 6 Wall. U. S., 719, opinion by Judge Davis.

§ *Pearson v. Daniel*, 2 Dev. & Bat. Eq., 366; *Jackson v. Borgott*, 10 Johns., 457; *Cox v. Wilner*, 23 Ill., 476; *Rupert v. Mark*, 15 Ill., 542.

|| *Rogers v. Hoskins*, 14 Ga., 166; *Sug. on Vend.*, 755, and authorities cited.

¶ *Lamont v. Stinson*, 5 Wis., 443; *Butler v. Stephens*, 26 Me., 484; *Wade on Law of Notice*, ch. i., § 7.

short of what might be correctly termed absolute knowledge."* What has been said as to the evidence competent to fix actual notice is sufficient on this point.

Knowledge is imputed to one who has the means of knowledge. Ignorance of an important fact, which has been placed in easy reach, is not excusable.

Constructive Notice.—Mr. Pomeroy very pertinently criticises the many loose definitions and classifications of notice, *actual* and *constructive*, and says: "I prefer, and shall adopt, the classification approved and followed by many of the most eminent judges, which has the merit of simplicity, naturalness, and certainty. According to this arrangement 'actual' notice embraces all those instances in which positive personal information of a matter is directly communicated to the party, and, this communication of information being a fact, is established by evidence *directly* tending, with more or less cogency, to its proof. '*Constructive*' notice includes all other instances in which the information thus directly communicated cannot be shown; but the information is either *conclusively* presumed to have been given and received from the existence of certain facts, or is implied by a *prima facie* presumption of law in the absence of contrary proof."†

This definition is complete, and cannot, perhaps, be better expressed. For instance, the notice fixed by statute on the registration of a deed is a *conclusive* and a positive *presumption of law*, made so by statute. But the notice fixed by *possession* of one other than the vendor is only a *prima facie presumption*, which, in the absence of proof to the contrary, is accepted as true; yet this is a *rebuttable conclusion of facts* which may be explained. The purchaser may show that he made all diligent effort to obtain information, but could not.

Definition of Notice in the abstract.—The same author says: "Judges and text-writers have seldom attempted to define *notice* in the abstract, but have generally contented themselves with specifying instances, or describing its kinds and effects. Within the meaning of these rules notice may, I think, be correctly defined as the *information concerning a fact* actually communicated

* Wade, § 7; citing *Barnes v. Clinton*, 3 Penn., 67, and other cases in note

1. See, also, 2d Pomeroy's Eq. Jur., § 596 (notes).

† 2 Pomeroy's Eq. Jur., § 593.

to a party by an authorized person, or actually derived by him from a proper source, or else presumed by law to have been acquired by him, which information is regarded as equivalent, in its legal effects, to full knowledge of the fact, and to which the law attributes the same consequences as would be imputed to knowledge."* This, too, is a *definition* without fault, in the opinion of the writer of this chapter. It is said that the English editors of the *Leading Cases in Equity* attempt no general definition. The American editor says: "In legal parlance notice is information given by one duly authorized, or derived from some authentic source. Notice may be either actual or constructive."† "Actual notice need not be full, circumstantial information of every material fact affecting the right of the person receiving it; it is enough that it be information directly tending to show the existence of the fact, and sufficient to put the party on an inquiry."‡

But to return to "*constructive*" notice.

Definition.—Says Chief Baron Eyre: "*Constructive* notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent that the court will not allow of its being controverted."§ The great American commentator on equity has said of "*notice*:" "Knowledge imparted by the court on presumption too strong to be rebutted, that the knowledge must have been communicated."|| These definitions, it seems, would exclude all those cases where the legal presumption of notice is subject to rebuttal or explanation.

Chancellor Kent, in *Stery v. Arden*,¶ said: "I hold him chargeable with constructive notice, or notice in law, because he had information sufficient to put him upon inquiry."

These definitions and distinctions will not be further noticed in this place, but the student is referred to Wade on the *Law of Notice* for a full discussion of this interesting subject. The legislation in regard to registration has done away with much of the trouble incident to the question of notice. For, by these acts,

* 2 Pomeroy's Eq. Jur., § 594.

† 2 Eq. Lead. Cases, 144.

‡ Barnes v. McClinton, 3 Penn., 67; 4 R. I., 173, 215.

§ Plumb v. Fluit, 2 Anstr., 432.

|| Story's Eq. Jur., § 399.

¶ *Stery v. Arden*, 1 John. Ch., 261; in accord, *Edward v. Thompson*, 71 N. C. R., 177; *Hughes v. United States*, 4 Wallace (U. S.), 232; 29 Ill., 80.

the *fact* of registration is notice in *law*, which will not admit of rebuttal. The effect of *lis pendens* is the same, where the application is properly made; likewise, the notice to the agent creates a *presumption* in *law* that the same was communicated to the principal.

The following instances of *constructive* notice may be mentioned :

1. Where land is purchased, being at the time in the possession of a third party, or the agent of such party, fixes the purchaser *prima facie* with notice of such claim, and the character of the same.*

2. Another kind of constructive notice arises from the *recitals*, *statements*, and *references* in *title-papers*.

3. The principal is charged with notice when information or knowledge has been obtained by his *agent*.

4. *Registration*, pursuant to statute.

5. *Lis pendens*.

1. *As to Notice by Possession*.—The possession, to give notice, must be *actual*, *notorious*, and *continuous*,† and *exclusive*, so far as the subsequent purchaser's grantor is concerned. As to the several qualifications of this rule consult Wade on the *Law of Notice*. The general doctrine is well expressed by Justice Field in a late case in the Supreme Court of the United States.

He says: "That he (Hughes) could not be heard to complain,

* *Edwards v. Thompson et al.*, 71 N. C., 177; *Hughes v. The United States*, 4 Wall. (U. S.) R., 232; *Wade's Law of Notice*, § 273, 278 (note 1).

In the case of *Edwards v. Thompson*, the purchaser lived in the State of South Carolina, and yet the court held him chargeable with notice of the title of the party in possession. Also that the possession of the tenant was notice of the landlord's equity or claim. Mr. Wade says, however, that the authorities are in conflict in this country as to whether the possession by the tenant is notice of the adverse claim of the owner. In England the weight of authority inclines upon the side of restricting the operation of such possession to notice of the title of the actual occupant. *Wade's Law of Notice*, § 281. For the English doctrine, see *Barnhart v. Greenshields*, 28 Eng. L. and Eq., 77; 2 Sug. on Vend., § 762.

† *Hunter v. Watson*, 12 Cal., 363; *Fair v. Stewart*, 29 Cal., 486; *Wade, Law of Notice*, § 288, citing *Brown v. Volkenning*, 64 N. Y., 76; *Kendall v. Lawrence*, 22 Pick., 540; *Macon v. Sheppard*, 2 Hump. (Tenn.), 335.

for the reason that the *open, notorious, and exclusive* possession of the premises by the parties claiming under *Goodbee*, when the *patentee* made his entry and received the patent, *was sufficient to put him upon inquiry as to the interest, legal or equitable, held by them, and if he neglected to make the inquiry, he is not entitled to any greater consideration than if he had made it and ascertained the actual facts of the case.*"*

Some Qualifications of this Rule.—1. The possession and right claimed must be contemporaneous. Therefore in ejectment, where the defendant was in possession under a quitclaim deed, such possession was only notice of such title and interest as he had. And it appeared that at the time the grantor under whom he claimed had not been seised of the property, a deed, of which the plaintiff had no notice, made to defendant *after* he quit, the possession being unrecorded, it was held that the *previous* possession would not affect the subsequent purchaser with notice of his *after-acquired title*.†

2. If the possession is *abandoned* at the time of the purchaser's deed the prior possession will not operate as notice.‡

3. The possession must refer to the *record* title, if he has such a title, and not to an undisclosed title or interest which the possessor may have.§

4. If the possessor by his own act put upon record a title or instrument inconsistent with title in himself, he is estopped from relying on his possession as evidence of notice to subsequent pur-

* Justice Field in *Hughes v. United States*, 4 Wall. R., 232. Mr. Pomeroy concludes that it is well settled by American authority, also, that a purchaser by means of the lessee's possession is put upon inquiry as to all the rights and interests under which he holds, and which affect the property, and is, therefore, chargeable with constructive notice of the lessor's title and estate. 2 Pomeroy's Eq. Jur., § 625, citing the following cases: 39 Cal., 442; 44 Cal., 508; 19 Iowa, 544; 4 Minn., 422; 23 Ill., 579; 3 Barb. Ch., 316; 14 Penn. St. (2 Harris), 112. See also the late case in North Carolina of *Edwards v. Thompson*, 71 N. C., 177; also, 3 Head. (Tenn.), 59; 9 Heisk., 479; 4 Hump. (Tenn.), 394; Wade, Law of Notice, §§ 33, 696. Possession of the tenant is sufficient, 2 Hump., 335; 21 Cal., 609; 26 Cal., 394; 1 Story's Eq., § 389.

† *Rupert v. Mark*, 15 Ill., 540; *New York Life Ins. Co. v. Cutler*, 3 Sanf. Ch., 176; Wade's Law of Notice, § 274.

‡ *Campbell v. Brackenridge*, 8 Blackf., 471.

§ *Plummer v. Robertson*, 6 Serg. & R., 179; 22 Minn., 532.

chasers, as in the case of a conveyance of the land to one in confidence, subject to a secret trust.*

2. *The Notice by Title-Papers.*—Mr. Wade says this kind of notice is usually characterized as constructive notice, but suggests that it would be more accurate to designate it as *presumptive notice*.†

It is true that the recitals of one's own deed is regarded as actual notice, and it would not be unreasonable to say that when his deed referred to the other instruments he is put upon such inquiry as to fix him with actual notice. But when he is sought to be charged with notice by recitals contained in instruments affecting the title other than his own immediate deed it is properly classed as *constructive notice*.

Recitals in Original Patent.—Says Wade: "So where the title is derived from the General Government by a patent which contained recitals affecting the title in the hands of a purchaser however remote from the original patentee, such recitals will affect the purchaser, although he was ignorant both of the recitals and facts recited, when he acquired the title."‡ This kind of evidence cannot be rebutted by any evidence of failure to obtain the truth or of ignorance. This presumption extends to unrecorded documents as well as those which have been duly recorded.§

So that a purchaser holding under a deed, or through a series of prior deeds, he is charged with notice of every matter affecting the estate which appears by recital or reference. Such, for instance, as description of parties or any other recital appearing upon the face of each of these instruments which forms an essential link in the chain of title. Says Mr. Pomeroy: "The right of such purchaser is, under our system of conveyancing, confined to the instruments which constitute his chain of title, which are his title-deeds, and everything appearing in those instruments and forming a legitimate part thereof, is a necessary element of

* *Newhall v. Pierce*, 5 Pick., 450; 38 N. J. L., 165.

See also the doctrine discussed in 4 Penn. St., 173; 7 Watts, 385. Also an interesting case in Illinois, *Stone v. Cook*, 79 Ill., 424.

† *Wade's Law of Notice*, § 309.

‡ *Wade's Notice*, § 307.

§ 2 *Pomeroy's Eq. Jur.*, 627; *Nelson v. Allen*, 1 Yerg., 360; *Corbitt v. Clenny*, 52 Ala., 480; *Stidham v. Mathews*, 29 Ark., 650; *Honore's Exrs. v. Bakewell*, 6 B. Mon., 67.

his title.”* The same author further says: “Any description, recital of fact, reference to other documents, puts the purchaser upon an inquiry; he is bound to follow up this inquiry step by step, from one discovery to another, from one instrument to another, until the whole series of title-deeds is exhausted, and a complete knowledge of all the matters referred to in their provisions and affecting the estate is obtained.”†

Nature of the Recitals which Bind the Purchaser.—It is sufficient if the recitals lead to knowledge. The matter of fact, which the purchaser is presumed to take notice of, should be referred to in the deed or other instrument in such a general way that it should be reasonably certain and specific, the recitals containing sufficient information to put a man of reasonable observation and prudence upon inquiry leading to the truth. It is obvious that mere vague allusions to something which may or may not amount to an interest in the property, will not suffice.‡

The statutory conveyance by a sheriff's deed is composed of such constituent parts as judgment, levy, and deed, each being essentially requisite to a perfect conveyance. The purchaser is bound by these facts. He is presumed to have examined the record, and each step in the progress of the litigation, resulting in the sale and sheriff's deed. See this doctrine as discussed in *Nelson v. Allen*.§ It applies only to deeds or other instruments actually in existence, and does not apply to deeds which may be executed in the future.||

A purchaser could not, therefore, be charged with notice of the

* 2 Pomeroy's Eq. Jur., § 626.

† 2 Pomeroy's Eq., §§ 626, 627, 628, 629, 630. Among the vast number of cases to sustain this position reference is made to *Chicago, etc., R. R. v. Kennedy*, 70 Ill., 350; *Frye v. Partridge*, 82 Ill., 267; *Allen v. Pool*, 54 Miss., 323; 20 Ind., 40; 4 Litt. Ky., 317; 51 Mo., 227; *Willis v. Gray*, 48 Texas, 463; 30 Gratt., 708; 37 Wis., 449; 8 N. Y., 271; 102 Mass., 375; 7 Conn., 324; *Christmas v. Mitchell*, 3 Ire. Eq., 535; *Nelson v. Allen*, 1 Yerger, 360. See also *Brush v. Ware*, 15 Peters (U. S.), 93; *Oliver v. Piatt*, 3 How. (U. S.), 333, 409; *Wade's Law of Notice*, §§ 309, 314, 316.

‡ *Wade, Notice*, § 316; *French v. Loyal Co.*, 5 Leigh, 627; see *Ballas v. Lloyd*, 2 Watts, 401.

§ *Nelson v. Allen*, 1 Yerger (Tenn.), 360, 367-8.

|| 2 Pomeroy, Eq., § 630. As to certainty in the recitals, “the recital must be such as to explain itself by its own terms, or refer to some deed or circumstance, which will lead to an explanation.” *White & Carpenter*, 2 Paige, 217.

contents of a deed, which is merely in contemplation. Said Lord Thurlow, in *Cothay v. Sydenham*:* “If the notice had been of a deed actually executed, it certainly would do; but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case nor reasoning which goes so far as to say that a purchaser shall be affected by notice of a deed in contemplation.” “The notice arising from title-deeds, like every other instance or kind of constructive notice, does not operate between the immediate parties to a conveyance, the grantor and grantee, mortgagor and mortgagee, but only between a purchaser, grantee, or mortgagee, and some prior party holding or claiming to hold an adverse right, interest, or title.”†

Of course, the immediate parties are supposed to have read their titles, and therefore have actual notice; for example: where a deed of land described it as incumbered by a mortgage, the grantee would have actual notice of such incumbrance.‡

3. *Notice as between Principal and Agent.*—The rule has been held necessary to subserve the ordinary business affairs of the country. It embraces agents, attorneys in fact, directors, managers, presidents, cashiers and other officers, while engaged in their appropriate and legitimate business. It includes trustees on behalf of their beneficiaries, agents acting for a married woman, and to one or two or more joint agents § This rule has its limitations. It does not include the employment of an agent or attorney to do a merely ministerial act for his principal, as where he is employed simply to procure the execution of a deed, or to record a mortgage. Then again, in order that notice to the agent shall affect the principal, it must be within the scope of the agent's authority. It is obvious that if an agent cannot bind his principal by acts beyond the scope of his authority, that a notice beyond that limit would be equally nugatory.|| The information

* *Cothay v. Sydenham*, 2 Bro. Ch., 391.

† 2 *Pomeroy*, Equity, § 631; *Champlin v. Laytin*, 6 Paige, 189, 203.

‡ *Guion v. Knapp*, 6 Paige, 35; 2 *Watts*, 401.

A deed by an administrator, trustee, or married woman, gives the purchaser notice of the *trusts* and of the *husband*. *Steedman v. Poole*, 6 Hare, 193; *Dudley v. Witter*, 46 Ala., 664. Grantee from one joint owner has notice of the rights of the other joint owner or owners. *Campbell v. Roach*, 45 Ala., 667.

§ *Pomeroy*, Eq., § 667, and notes.

|| *Weisser v. Denison*, 10 N. Y., 68; *Roach v. Karr*, 18 Kansas, 529; *Grant v. Cole*, 8 Ala., 519.

constituting the notice by construction must be imparted to him while acting *as agent*.*

The notice which will bind a corporation through its director, agent, or manager, must be at the time when he was not only clothed with the power to act, but must have been actually engaged in transacting the business of the corporation.†

The general rule that the principal is bound by the agent's knowledge, is based on the principle of law, that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty.

Says Folger, Judge, in *Holden v. N. Y. and Erie Bank*:‡ “Notice must have come to the agent, it is said, in the course of the very transaction, or so near before it that the agent must be presumed to recollect it. This limitation, however, applies more particularly to the case of an agent whose employment is short-lived, so that the principal shall not be affected by knowledge that came to the agent before his employment began, nor after it was terminated.” He said, however, the rule was not so limited where the agency was continuous, and the transactions consisted of a long series of acts.

Other Limitations.—The information acquired by the agent must be material to the transaction in which the principal's rights are to be affected by a notice, and it must be something which it is the duty of the agent, by virtue of his fiduciary and representative relation, to communicate to his principal.§ Lord Westbury,

* *Pepper v. George*, 51 Ala., 190; 20 Mich., 419; *Distilled Spirits, etc.*, 11 Wall. (U. S.), 356; 39 Conn., 238; *Fry v. Sheehee*, 55 Georgia, 208. As to the notice which affects the principal, see 9 Heiskell (Tenn.), 479; 4 Baxter, 26; 3 Head., 59; 4 Hump., 394; Wade, Law of Notice, 672-695.

† Consult the following cases for the doctrine mentioned in the text: *Fulton Bank v. N. Y. and Sharon Co.*, 4 Paige, 127; *Seneca Co. Bk. v. Neass*, 5 Denio, 329; *Farmers' Bank v. Payne*, 25 Conn., 444; 10 Md., 517; 20 Mich., 419. As to limitations of the rule that “*notice to agent is notice to the principal*.” *Pomeroy's Eq. Jur.*, §§ 669, 670, 671, 672, notes; *Tagg v. Tenn. Nat. Bk.*, 9 Heiskell, 479; *Fuller v. Bennett*, 2 Hare, 394.

‡ *Holden v. N. Y. and Erie Bk.*, 72 N. Y., 236. This latter case is one of interest on this point, and will well repay the trouble of a careful perusal by the student.

§ 2 *Pomeroy's Eq.*, § 673, note 1. See the case of *Distilled Spirits*, 11 Wallace, U. S., per Justice Bradley.

in *Wyllie v. Pollen*,* said: "The agent's knowledge must have been of something material to the particular transaction, and something which it was the agent's duty to communicate to his principal, the whole doctrine of constructive notice resting on the ground of the existence of such a duty on the part of the agent."

It need not appear generally that the agent actually gives the information to the principal, for the rule of constructive notice between agent and principal depends upon a conclusive *legal* presumption that the information had been communicated to the principal. Motives of policy inhere in this very presumption.†

There are two exceptions to the *conclusiveness* of the presumption that the agent had given the information to his principal, namely:

1st. Where an agent or attorney is acting for both parties to a transaction, A. and B., for both vendor and vendee, mortgagor and mortgagee, and having information of a material fact, with the consent of one of the parties, *conceals* his knowledge from the other party. The conduct of A. or B. in consenting to the concealment is clearly a fraud, and is estopped from saying afterwards that the *other* party had notice.

2d. *The Agent's Fraud*.—When the agent or attorney in the course of his employment has been guilty of fraud, contrived for his own benefit, by which he intended to defraud, and did defraud, his own principal or client, as well as perhaps the other party, and the very perpetration of the fraud involved the necessity of concealing the facts from his principal or client, then the principal is not charged with this constructive notice. In this instance the very opposite presumption is raised, namely, *that he did not communicate the facts to his principal*.‡

It does not follow, however, that every fraud committed by the agent will have this effect. There might be facts and information communicated to the agent upon which the law would fix upon the principal a knowledge of a *trust*, and at the same time the agent might be guilty of a fraud in reference to the trust

* *Wyllie v. Pollen*, 3 D. G. J. & S., 596; in accord, *Rolland v. Hart*, L. R., ch. vi., 678.

† *Williamson v. Brown*, 15 N. Y., 354; 113 Mass., 391; 2 Pomeroy's Eq., § 673, and full notes.

‡ *Kennedy v. Green*, 3 My. & K., 699; *Rolland v. Hart*, L. R., ch. vi., 678. See 4 Paige, 127; 27 N. J. Eq., 33; 36 Ill., 114.

fund; this fraud might not prevent the notice which the law presumes as against the principal. It is sometimes difficult to tell whether a case does or does not fall under this exception. Many of the cases rest confessedly upon very narrow distinctions.*

It may be observed, that if the agent is affected by *constructive* notice, the principal is likewise affected.

The entire doctrine is founded in policy and expediency. For a full and complete view of the whole doctrine of notice, consult Wade on the *Law of Notice*.

4. *Registration pursuant to Statute*.—Perhaps the most conclusive *constructive* notice is that created by positive statute, in the shape of registration acts, in the United States. England has no general registration system, although there are found several local statutes applicable to different counties.† The Irish Registry Act of 6 Anne is construed by the courts very much like our American registry acts.

This statute expressly gives absolute priority to the deed or conveyance first registered. And the fact that a subsequent purchaser has no notice and has paid a valuable consideration, will not prevent the effect of the *constructive* notice resulting from the “registry act.” There is some variation in the details and language of the American registration acts, but the plan of the system and the objects are very much the same. The instruments admitted to record are not the same in all the States, but generally they include deeds, leases, mortgages, assignments of mortgages and of leases, title-bonds, and generally every species of conveyance by which an interest in land, either legal or equitable, is created or transferred.

The English and American theory: In the former, the language authorizing the registration is permissive, while the statute is silent as to notice, so a registry of itself is not notice to a subsequent purchaser who has obtained the legal estate; but in the American States a much broader and more effectual meaning is attached. The intention is to compel every person to place the written evidence of his title upon record, in order to protect his

* See this doctrine elaborated in Pomeroy's Eq., vol. ii., 673, 674, 675, and copious notes.

† 2 Pomeroy's Equity Jur., § 645, with foot-note reference to these statutes.

own rights and others who might afterwards seek to deal with the same property.

Who Affected by the Registration Notice.—In the first place, this notice does not apply to the contracting parties, but to third parties.* The purchaser is not bound by the recorded titles of his vendor, but he may rely upon the representations of his vendor, and has the equity to rescind or specifically perform, as the facts and circumstances may authorize a court of equity to act.

The vendee is never bound to accept a defective title.†

But this question must depend somewhat on the language of the recording acts. Says Pomeroy, on this point: "While the terms of the statutes may differ, in respect to this matter, in some of their subordinate and qualifying phrases, they all agree in the main and substantial provision; they all declare that an unrecorded conveyance is invalid only as against subsequent purchasers or incumbrancers; and that, as a necessary inference, that the record only operates as notice to the same persons."‡ In several of the statutes the qualification is added that the subsequent purchaser, who is thus protected, must be one "in good faith, and for valuable consideration;" in many of them this language is absent; but, whether expressed or not by the legislature, it has uniformly entered into and formed a part of the judicial interpretation. In some instances, "creditors" are expressly added.§ Registration is not, therefore, notice to all the world, and only applies to those persons who, under the policy of the legislature, are required to search the records to protect their own interests. It has no application to prior parties.

In Tennessee, the 12th section of the Registration Act of 1831, ch. 90, declares all instruments not registered in conformity to

* Judge McFarland, in *Top v. White*, 12 Heisk. (Tenn.), 165, citing *Napier v. Elam*, 6 Yer., 108; *Ingram v. Morgan*, 4 Hump., 66.

† *Top v. White*, 12 Heisk., 165. In North Carolina a mortgage is valid between the parties without registration, but void as to third parties purchasing for value. *Deal v. Palmer*, 72 N. C., 582.

‡ *Hunter v. Watson*, 12 Cal., 363.

§ 2 Pomeroy's Eq., § 656. The notice is to purchasers under the same grantor. There might subsequently be a purchaser of the same subject-matter from another source. The registration is only constructive notice to subsequent purchasers who derive title from the same grantor. *Baker v. Griffin*, 50 Miss., 158; 9 Ga., 23; 76 N. Y., 463.

this act "shall be null and void as to existing or subsequent creditors or *bona fide* purchasers without notice." Under this act the court held that *judgment* creditors were meant.* A mortgage deed is good between the parties without registration, and also valid without registration as to a subsequent purchaser with notice of its existence.†

Requisite of the Record which creates Constructive Notice.—This constructive notice is unknown to the common law, and being the creature of statute, the same should be exactly complied with. And whatever is required by the legislature must be done before the recorded paper shall have the statutory effect of notice.

The notice only applies to such instruments as the act requires to be registered, so the voluntary recording of a paper, not authorized by statute, is a nullity.‡ So, under the statute of Tennessee, in which title-bonds are required to be registered, the doctrine of equity is changed by the statute. For, as a rule of equity law, a purchaser from a party with notice of the existence of a title-bond from the same grantor takes it subject to such equity as the bond may disclose. There A. sold land to B., and B. took a title-bond from A., and had paid the purchase-money, but failed to have the bond registered. The land was levied on and sold as the property of A., and it was held that the purchaser took a good title, notwithstanding *he* had notice of the title-bond.§

* 1 Cold., 265; 2 Sneed, 164; and that a mortgagee was not within the act.

† 6 Yerger, 320; 3 Head., 719; 2 Sneed, 164. In case of defective registration, as, if executed out of the State and not proven as required by the statute, the instrument, although registered, does not become a constructive notice to a purchaser for value: *Todd v. Outlaw*, 79 N. C., 235; and passes no title as against strangers: *Robinson v. Willoughby*, 70 N. C., 358.

Until properly probated, the register has no right to place the same on his books: *Todd v. Outlaw*, *supra*; *Williams v. Griffin*, 4 Jones, 31; 3 Jones, 113; 11 Ire., 162; 11 *Ibid.*, 307; 2 Ire. Eq., 584; *Busbee Eq.*, 283; (*Bailey's Digest*, 335).

‡ *Betser v. Rankin*, 77 Ill., 289; *James v. Morey*, 2 Cow., 246; *Bossord v. White*, 9 Rich. Eq., 483.

§ *Butler v. Maury*, 10 Hump., 420. But, *per contra*, in the State of North Carolina, ch. 35, sec. 24, *Battle's Revisal*. All contracts to convey land shall be registered within two years, and, therefore, not placed on the same footing with mortgages and deeds of trust. If a party purchase with knowledge of the title-bond, he is bound by it. *Derr v. Dellinger*, 75 N. C., 300; *Todd v. Outlaw*, 79 N. C., 235.

It was for the reason that the instrument without registration was by the act absolutely void as to *existing or subsequent creditors*.

It was contended in that case that the purchaser at the execution sale, having *had* notice, was not protected by the terms of the statute, "*bona fide* purchaser without notice," but the court said the statute had reference to sale by act of the parties, and not a sale by act of law (as execution sale). Perhaps a better reason might have been assigned, namely, that the unregistered bond was void as to the creditor, who must be a judgment creditor, and, therefore, such creditor could cause the same to be sold by execution on the judgment, and the purchaser was substituted by law to the rights of the creditor, and was not such a purchaser as the statute contemplated.

Perhaps both this reason and that stated by the court are correct.

But to return to the question as to what the record must show to give notice. It must appear that it was not only such instrument as the law required to be registered, but that the same was executed in the manner required by law to authorize its registration. There are many defects and imperfections which have come under this last rule, which will be found in the different State reports. The record must be made in the manner and in the book required by law.

In brief, it may be stated, when all the requisites to a valid registration have been complied with, when the paper-writing is one entitled to be recorded, then such record becomes a *constructive* notice, not only of the fact that the instrument exists, but of its contents, and of all the estates, rights, titles, and interest, legal and equitable, created or conferred by it, or arising from its provisions.*

If the registration is fatally defective, the certified copy is not evidence, which is equivalent to no registration.†

* *Orvis v. Newell*, 17 Conn., 97; 23 Mo., 117; 1 Swan. (Tenn.), 396; Lea, 144; 1 John. Ch., 229; 6 Cal., 297; 30 Penn. St., 393; 17 Wend., 103; 51 Me., 40; 39 N. H., 439; 15 Ohio St., 286; 4 Mich., 87; 12 Kan., 282; 20 Cal., 509; 82 N. Y., 32.

† 5 Sneed., 689; 6 Heisk., 55.

Purchasers with notice, and the creditor who is the vendor of the land, cannot take advantage of a mistake made in registration. 1 Swan., 396. Where date of registration is omitted on the record, the date may be shown by the register. 7 Hump., 84; 10 Yerg., 147.

It might be further said that the great object of these registration laws is to create a *notice* by a pure *construction* of law, and thereby dispense with the often difficult problem of proving *actual* notice from a vast number of facts and circumstances. Already the law had said that *adverse possession*, the *knowledge of the agent* and *lis pendens* operated as *notice*, in the instances shown in the books; and now, at a later day, the legislature deems it wise and expedient to say that *registration of certain instruments* shall constitute *notice* to all subsequent purchasers from the same grantor.

This *notice* by registration constitutes a prominent and important feature in our real estate controversies, as well as others. In the case of *Martin v. Oliver** the great question was as to the power of the husband to settle his entire estate upon his wife, when he was not indebted at the time. The court sustained this power, and by way of argument against the supposed abuses of such conveyances, said that the *registration* of the deed put persons dealing with the husband on complete notice of the character of the possession which the husband continued to exercise over this property after the conveyance.

Does Registration Exclude other Kinds of Notice?—Some of the courts, both in England and America, have been inclined to hold that where the registration act had been adopted, that this provision for a written record excluded, necessarily, parol evidence to show notice of an instrument which *existed*, but which was not recorded at the *time* of the *subsequent* purchase, or at the time of the rendition of the judgment in the case of a creditor.

This question was elaborately discussed by Judge Gaston, of North Carolina, in *Flemming v. Burgin*;† also, by Judge Bynum, in the very recent case of *Todd v. Outlaw*, 79 N. C., 235.

It is generally conceded, however, in all the cases, that notice of some character or other is admissible to fix knowledge effect-

* *Martin v. Oliver*, 9 Hump. (Tenn.), 561.

† *Flemming v. Burgin*, 2 Ire. Eq., 584. In Ohio the courts seem to hold under the statute that no notice is sufficient to charge the second incumbrancer, and that he acquires absolute precedence by registration, although with notice of the prior incumbrance. *White v. Derman*, 1 Ohio St., 110; 16 Ohio, 59; 16 Ohio, 533. *Flemming v. Burgin* makes North Carolina go almost that far, too.

ively on a subsequent purchase, but what kind of notice, is the great question? Must it be "*actual*" in its strictest sense, or will "*constructive*" notice in any case be sufficient, as the knowledge of the agent, for instance? The holding of the English courts and some of the American courts is given in the foot-note; and, as to whether the notice shall be *express* or otherwise, it may assist the student on this point to have other authorities. Mr. Wade* relies on many other authorities as holding, like the North Carolina and Ohio courts, that the notice must be so direct and positive that to disregard the same would be positive fraud on the part of the subsequent purchaser.

But says Mr. Wade: "From a careful consideration of the authorities, old and new, English and American, it seems that the better doctrine is now, except where the statute is imperative in its provisions to the contrary, that any species of notice, by which one seeking to purchase real estate is informed of, or cautioned in regard to any unregistered instrument, is sufficient to bind the purchaser." Putting the party on inquiry is sufficient in many of the cases.†

The statute of North Carolina, among other things, provides that "no deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lieth," etc.‡

Under this statute registration is essential to a mortgage or deed of trust. And from the peremptory character of the statute

* Wade's Law of Notice, § 245; citing *Pomeroy v. Stephens*, 11 Metc. (Mass.), 244; *Spofford v. Weston*, 29 Me., 140; 4 Allen, 406; 9 Yerg., 64; 2 Ire. Eq. (N. C.), 495; 8 Cow., 260.

† Wade's Law of Notice, §§ 246-9; citing, among others, *Porter v. Cole*, 4 Me., 20; *Williamson v. Brown*, 15 N. Y., 354; *Hankinson v. Barbour*, 29 Ill., 80; *Hopkins v. Gerard*, 7 B. Mon., 312; *Curtis v. Mundy*, 3 Metc. (Mass.), 405; 52 Penna. St., 492; 50 Miss., 278; 5 Oregon, 313; 41 N. H., 60; 26 Cal., 79; *Edwards v. Thompson*, 71 N. C., 177.

Note.—I think Mr. Wade is mistaken in the question decided in *Edwards v. Thompson*. The question of notice of unregistered deed was not involved. And see the *later* case in same State, *Todd v. Outlaw*, *supra*.

‡ Battle's Revisal, ch. xxxv., sec. 12. This chapter provides that deeds of conveyance and deeds of gift shall be valid only on the condition of registration within two years after the date thereof (secs. 1-10).

the court was inclined to hold that no parol proof was competent to show actual notice of an unregistered mortgage as against a subsequent purchaser who had placed his conveyance upon record. It was intimated, however, that, as held by the English chancellors, if the knowledge of the subsequent purchaser was such as to amount to *fraud*, then it could be shown; and further, in these cases, where parol proof is admissible, the proof must be as full and complete as if the prior deed had been seen. And the judge refers to the cases of *Leneve v. Leneve*,* *Hine v. Dodd*,† *Wyatt v. Barwell*.‡

The English judges made the argument that the act of Parliament (in requiring registration) was intended to avoid disputes and prevent perjury; therefore nothing short of clear and undoubted proof of notice was admitted against a subsequent purchaser who had paid a valuable consideration.

This doctrine is merely the application of the broad, general principle, that a person who purchases an estate, although for a valuable consideration, after notice of a prior equitable right, makes himself a *mala fide* purchaser, and will be held as trustee for the benefit of the person whose right he sought to defeat.§

The modern English cases, Mr. Pomeroy thinks, while still insisting upon fraud as the sole basis of the doctrine, hold that the same effect may be produced by constructive notice, as by an actual one, upon a subsequent purchaser who registers his conveyance. "The inquiry no longer seems to be whether the notice was actual or constructive, but whether the evidence was sufficiently definite, and the circumstances were sufficient to affect the conscience of the purchaser as a fact, and not merely as a possible inference."||

* *Leneve v. Leneve*, 3 Atk., 646.

† *Hine v. Dodd*, 2 Ark., 275.

‡ *Wyatt v. Barwell*, 19 Ves., 435. See 3 Vesey, Jr., 487; 1 Story Eq. Jur., 396; 2 Johns. Ch., 190.

§ Lord Hardwicke, in *Leneve v. Leneve*, 2 Eq. Lead. Cas., 109 (4th Am. ed.). Lord Hatherly said: "It is not, perhaps, very easy to see the exact shades of distinction between the cases, but this appears to be decided from the time of *Hine v. Dodd* downwards, that mere suspicion of fraud is not enough, and there must be actual notice implying fraud in the person registering the second incumbrance to deprive him of priority thereby gained over the first incumbrance." *Rolland v. Hart*, L. R., ch. vi., 678.

|| 2 Pomeroy's Eq. Jur., § 662 (notes).

There is some diversity among the decisions of the American courts as to whether this notice must be *actual* or *constructive* simply; and this diversity results to some extent from the different language and expressions found in registration statutes. It is sometimes difficult to distinguish "actual" notice, so defined, from constructive.*

On this point Mr. Pomeroy has made a diligent comparison of the statutes and the decisions of the different States, and the *rationale* of notice in the place of the record, comes to this conclusion: "By this American doctrine the constructive notice given by a registration stands on exactly the same footing, produces the same effects, and is of the same nature, as any other species of absolute constructive notice recognized by equity—as, for example, that arising from a *lis pendens*, or from the recital, or that operating upon a principal through his agent. In all these instances the notice is a conclusive presumption of the law, and it is immaterial whether or not any information of the prior right was actually brought home to the consciousness of the party affected thereby. As, therefore, the one important and necessary effect of a registration, in pursuance of the American statutes, is to create and impose upon subsequent purchasers a constructive notice of a recorded instrument, it seems to be the natural and inevitable consequence of this view, that any other species of notice, either constructive or actual, should, in the absence of a record, produce the same effect upon the rights of a subsequent purchaser. The registration of an instrument is constructive notice; and this result was the main design of the legislation.

"It is, therefore, natural, just, and equitable, that if a subsequent purchaser has received any other kind of notice, actual or constructive, the same effect upon his rights should be produced as would have followed from the single species of constructive notice occasioned by statute.

"In this manner, all kinds of constructive notice are, with respect to their effects upon the rights of subsequent purchasers, harmonized and placed upon the same footing. In my opinion this view furnishes a complete, adequate, and true *rationale* of the doctrine under discussion. It dispenses with the notion of fraud,

* See upon this point, *Brinkman v. Jones*, 44 Wis., 498, 519; *Maupin v. Emmans*, 47 Mo., 304.

as a necessary element, which in very many admitted instances of notice must be a mere figment of judicial logic; it avoids all the inconsistencies which are incidents of that notion, and finally it accords with the intent and purpose of the recording acts, as recognized by the vast majority of American decisions.”*

In this view Mr. Pomeroy ignores the idea that the policy of the legislature might be to cut off all parol evidence and to prevent perjury, as indicated by the English judges. In the absence of an imperative act of this kind the views suggested ought to prevail.

What Kind of Estate is Conferred by Unregistered Deed.—An unregistered deed does not confer such a title as will enable the holder thereof to recover in an action of ejectment. It is an equitable title, but of greater force and effect than an agreement to convey, because it is an inchoate and imperfect legal title also—is in its nature legal, but not a pure and legal title until registered. It has its force under the registry acts, and not under the statute of uses or conveyance at common law.†

An equitable title to land merely will not be sufficient to recover in ejectment.‡ But of this more will be said in a more appropriate place in this work.

5. *Notice by Lis Pendens.*—The last class of *constructive* notice is that of *lis pendens*. The whole idea is expressed in Lord Bacon’s rule: “No decree bindeth any that cometh in *bona fide* by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order; but when he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of court, there regularly the

* 2 Pomeroy’s Eq. Jur., § 665.

† Rogers’s Lessee v. Cawood, 1 Swan (Tenn.), 142; 2 Yerg., 93; 8 Yerg., 97; Meigs’s Rep., 496; Shields v. Mitchell, 10 Yerg., 1; Tenn., Act 1815, ch. 38, sec. 5; N. C., Acts 1829 and 1831. See decisions of the several States, 2 Pomeroy’s Eq., § 664, foot-notes.

‡ Tyler Eject., 43, citing Peck v. Newton, 46 Barb. R., 173; Fenn v. Holme, 21 How. (U. S. R.), 481.

It seems that in Pennsylvania the plaintiff may recover in ejectment on an equitable title in the State courts for the reason that under the laws of that State they have no court of chancery. Willing v. Brown, 7 Serg. & Rawle, 467. But this doctrine is not sustained in the United States courts, even when the action relates to land in Pennsylvania. Swayze v. Burke, 12 Peters (U. S.) R., 11; Tyler Eject., 44.

decree bindeth. But if there were any intermission of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matters according to justice.”*

While many of the authorities place this doctrine of *lis pendens* on the grounds of *constructive* notice, others place it upon the grounds of public policy.

It is undoubtedly the policy of the law not to allow litigant parties (especially the defendant) to give others, pending the litigation, rights to the property in dispute, so as to prejudice the other party. Then if litigation be pending as to the right of a particular estate, the necessities of the public require that the decision of the court shall be binding, not only on the immediate party litigants, but on all those who come in pending the suit, whether with or without notice of the pending judicial proceedings. Otherwise litigation could never come to an end. Whatever may be the foundation reasons of the rules concerning *lis pendens* they are firmly established by both judicial authority and reason. The reasons for the rules may tend to prevent the extension of the doctrine, and restrict its further application to particular persons and conditions of fact.† The authorities cited in the foot-note generally sustain Lord Bacon’s rule and the general principles discussed under this head.

The following brief qualifications and peculiarities of this doctrine might be stated without detail of argument :

1. It is generally confined to real estate.‡
2. It is a rule of the equity courts, but has been often applied in a court of law, as in ejectment.§

* Bacon’s Works, vol. ii., 479.

† 2 Pomeroy’s Eq., 631. The following cases may be examined with interest and profit on this interesting question: *Allen v. Pool*, 54 Miss., 323; *Murray v. Ballou*, 1 John. Ch., 566; *Choudron v. Magee*, 8 Ala., 570; also 22 Ala., 743; *Miller v. Sherry*, 2 Wall. (U. S.), 237; 4 John. Ch., 38; 63 Mo., 290; 43 Iowa; 29 Ark., 357; 25 Ohio St., 652; 47 Ga., 650; 4 Heisk. (Tenn.), 674; 7 Paige, 287; 48 N. Y., 585; 5 Duer, 631; 35 Conn., 250; 29 Md., 200; 18 B. Mon., 230; 53 Ill., 196; 51 Iowa, 663; *Sheridan v. Andrew*, 49 N. Y., 478; *Baird v. Baird*, Phillips Eq. (N. C.), 317; *Badger v. Daniel*, 77 N. C., 251; *Rollins v. Henry*, 78 N. C., 342; *Todd v. Outlaw*, 79 N. C., 235.

‡ *Allen v. Pool*, 54 Miss., 323; 22 Ala., 760; 30 Mo., 462; 63 Mo., 290; 43 Iowa; 47 Ga., 650; 4 Heisk. (Tenn.), 686; 38 Ind., 16; 73 Penn. St., 336; *Center v. Bank*, 22 Ala., 743; 31 Miss., 65.

§ In ejectment against the tenant in possession, one coming into possession by assignment or otherwise *pendente lite* will be bound by the judgment and

3. The property in litigation must be reasonably identified and described in the pleadings.*

4. The grantor must be a party at the time of purchase, and be impleaded at the time.

5. The suit to have this effect must be continuously prosecuted from the commencement to judgment or decree.

6. The rule only applies to purchasers, and not to mortgagees whose securities are prior to the suit, or holders of previously acquired equitable interests in the property.

7. There are statutory changes in England and in many of the States.†

The effect of these statutes, or rather the substantial requirements, are, that when the suit is brought or afterwards, prior to final judgment, the plaintiff shall file or procure to be recorded, in the county or counties in which the land is situate, a written notice *describing the lands to be affected* and the general nature of the action. And it is provided generally in these statutes, that no suit shall be notice to a purchaser *pendente lite* for value without such notice of *lis pendens* has been filed. The terms of these statutes apply alike to legal and equitable actions.

The ninetieth paragraph of the new code of North Carolina requires the plaintiff or defendant, who sets up a prayer for affirmative relief, to file this notice in *each county* where the property is situate, containing names of parties, object of action, and the description of the property in *that county* affected thereby; and if the action be for foreclosure of a mortgage, the notice must be filed twenty days before judgment.‡ The court of North Carolina refused to follow the construction placed upon a similar

may be ejected under judgment against the assignor and liable for mesne profits. See on these points, 4 Ala., 592; 9 Cow., 233; Wallen v. Huff, 3 Sneed (Tenn.), 82; Hickman v. Dale, 7 Yerg., 149; Jackson v. Stone, 13 John., 447; Bradley v. McDaniel, 3 Jones, 128; Forgarty v. Sparks, 22 Cal., 142.

* Allen v. Pool, 54 Miss., 323; 75 N. Y., 409; 68 Me., 334; Todd v. Outlaw, 79 N. C., 235; Badger v. Daniel, 77 N. C., 251; Rollins v. Henry, 78 N. C., 342; Coots's Law of Mortgage, 383; Adams's Eq., 157.

† See statutes 2 and 3 Victoria, ch. 11, § 7. See codes and statutes of New York, North Carolina, Connecticut, Illinois, Iowa, and in fact almost all of the States, as shown in 2 Pomeroy's Eq., § 640 (notes).

‡ Battle's Revisal, ch. xvii., § 90.

statute by the State of New York, as decided in *Lamont v. Cheshire*.*

It might be observed that these statutes have been passed because this doctrine of constructive notice by *lis pendens*, although well established, has been regarded as a harsh rule as to *bona fide* purchasers for value. It is said, indeed, never to have been a favorite of the court of equity, and never been enlarged beyond its well-established limits.†

The doctrine also applies to purchasers from either of the parties, either plaintiff or defendant, although the question is most usually raised as to the purchase from the defendant.

In case the purchaser is one at a sale "by the court," so to speak, such as partition sales, sales of real estate to pay debts, etc.; the rights and liabilities of these classes of purchasers are discussed under the heads of "Execution" and "Judicial Sales." Of course the *constructive* notice by this *lis pendens* only applies to those who purchase from *a party or privy pendente lite*. A purchase by one for the same land described in the pleadings from one not a party to the suit, or privy to such party, is never chargeable with constructive notice.‡

It has been also held, that to entitle a party plaintiff to the enforcement of the principle of *lis pendens* against a *bona fide* purchaser, without actual notice of the litigation, such party will be required to show reasonable diligence in the prosecution of his suit. Thus, in a case where it appeared that there had been a failure on the part of the plaintiff to make proper parties, whereby the litigation was unreasonably and vexatiously protracted, the

* *Lamont v. Cheshire*, 65 N. Y., 30; New York Code, § 132. The North Carolina court held that the statute had no effect as to real property situate in the county where the suit was pending. See *Badger v. Daniel*, 77 N. C., 251; *Rollins v. Henry*, 78 N. C., 342. See comments of Judge Bynum in *Todd v. Outlaw*, 79 N. C., 235, as to the propriety of this construction of § 90 of the code.

† *Leitch v. Wells*, 48 N. Y., 585; *Hayden v. Bucklin*, 9 Paige, 512; also the intimation of Judge Bynum, of the Supreme Court of North Carolina, in *Todd v. Outlaw*, *supra*. This relaxation of the rigid rule is said to apply to real estate only; as to personal property the rule remains as at common law: Judge Hunt, in *Leitch v. Wells*, 48 N. Y., *supra*.

‡ *Miller v. Sherry*, 2 Wall. U. S., 237; *Brundage v. Biggs*, 25 Ohio St., 652; *Faller v. Scribner*, 76 N. Y., 190; 28 Ill., 319; 24 Iowa, 154; 27 Mo., 560.

purchaser *pendente lite* was held not to be charged with constructive notice of the suit.*

How the Doctrine of Constructive Notice is Viewed by the Supreme Court of the United States.—In a late case† in that court they have attempted a careful application of the rules of constructive notice, and have held it inexpedient for courts of equity to extend this doctrine. Says Judge Grier: "A chancellor will not be astute to charge a constructive trust upon one who has acted honestly, and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors (page 622), where he says: 'In Ware v. Lord Egmont, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for gross negligence in the conduct of the business in question.'

"The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

This is certainly making the rule more *technical* and *rigid* than seems to have been adopted in many of the cases in the different States. Perhaps, at last, this is the safest qualification of the doctrine.

Of Priority in Equity—Purchaser for Valuable Consideration and Without Notice.—Thus far, in this chapter, in treating of notice, I have not only attempted to show what is notice, but incidentally much has been said of the *effect* of notice.

* Fox v. Reeder, 28 Ohio St., 181; 27 Mo., 560; Wade's Law of Notice, §§ 357, 358, 359. When a suit had been dismissed, and a bill of review subsequently filed, it was held that the suit was not pending during the time between the dismissal and filing bill of review so as to affect a purchase made within that time: 3 Ohio, 541. See 8 Ohio, 203; Wade's Notice, § 358.

† Wilson v. Wall, 6 Wallace, 83. See also, to the same effect, 4 Haywood (Tenn.), 280; Cooke, 167.

The doctrine of notice, as exemplified under certain special circumstances, will now be noticed in a summary manner. The doctrine of priority in equity is the result of two significant maxims, namely:

1. Where there are equal equities the first in order of time shall prevail.

2. Where there is equal equity the law must prevail.

Then, first, as to the *equality of equities*. With respect to this comprehensive idea the following maxim has a wide application both in law and equity: *Qui prior est tempore, potior est jure*. The rule as exactly here stated, is not strictly accurate; see the argument and illustration of an English equity judge in a recent case, namely, *Rice v. Rice*.*

The facts were as follows: A grantor conveyed land without receiving his purchase-money, but the receipt of it *was* indorsed on the deed, and the title-deeds were delivered to the grantee. Under the law in England the *vendor's* lien at once arose as security for the unpaid price, which was at least valid between the parties, and was *prior* to any equity thereafter created by the grantee. But the grantee now having a deed with this indorsement of receipt of purchase-money, afterwards borrowed money, and to secure its payment made an equitable mortgage of land by deposit of title-papers with the creditor from whom the loan was obtained.

Now here existed *two equities*, the *legal* title being in a third party (the grantee in this case). The *prior* equity, the *vendor's* lien, was in the vendor. The equity conferred by the *equitable mortgage* was, of course, *subsequent* in point of time. Now, if these *equities* had been *equal*, then the first in time would be better, but the circumstances made them *unequal*, hence the maxim announced did not prevail. The English court held that, as between the *vendor's* lien and the lien of the equitable mortgage, the possession of the title-deeds by the grantee, and the receipt of the price indorsed on the deed of conveyance, operated to make the latter lien *superior* to the former, and thus overcame the effect of *priority*. In that case the court said: "When we talk of two

* *Rice v. Rice*, 2 Drew, 73. See comments of Mr. Pomeroy, vol. i., §§ 414-15 (*Equity Jurisprudence*), on this rule and reference to authorities.

persons having equal or unequal equities, in what sense do we use the term equity? For, example, when we say that A. has a better equity than B., what is meant by that? It means only that according to those principles of right and justice which a court of equity recognizes and acts upon, it will prefer A. to B., and will interfere to enforce the rights of A. as against B., and therefore it is impossible (strictly speaking) that two persons should have equal equities, except in a case in which a court of equity would altogether refuse to lend its assistance to either party as against the other. If the court will interfere to enforce the right of one against the other, on any grounds whatever, say on the ground of priority of time, how can it be said that the equities of the two are equal; that is, in other words, how can it be said that the one has no better right to call for the interference of a court of equity than the other?

“To lay down the rule, therefore, with perfect accuracy, I think it should be stated in some such form as this: As between persons having only equitable interests, if their interests are *in all other respects equal*, priority in time gives the better equity, or *qui prior est tempore, potior est jure*. I have made these observations, not, of course, for the purpose of mere verbal criticism on the enunciation of a rule, but in order to ascertain and illustrate the real meaning of the rule itself, and I think the meaning is this: That, in a contest between persons having only equitable interests, priority of time is the ground of preference last resorted to, *i. e.*, that a court of equity will not prefer one to another on the mere ground of priority of time, until it finds, on examination of their relative merits, that there is no other sufficient ground of preference between them, or, in other words, that their equities are in all respects equal, and that, if the one has on *other grounds* a better equity than the other, priority of time is immaterial.

“In examining into the relative merits (or equities) of two parties having adverse equitable interests, the points to which the court must direct its attention are obviously these: The nature and condition of their respective equitable interests, the circumstances and manner of their acquisition, and the whole conduct of each party with respect thereto; and, in examining into these points, it must apply the test, not of any technical rule, or any rule of partial application, but the same broad principles of right

and justice which a court of equity applies universally in deciding upon contested rights."

This rule is expressed a little more technically in some of the decisions, especially in North Carolina.*

In these cases it is said that, in a contest between equities, "the elder is the better." But, in the light of the authorities, this means "if their interests are in *all other respects* equal," the "elder is the better." The simple fact of being the "elder" would not give the *priority*, without the other ingredient mentioned, namely, "*equal in all other respects*."

In the case of *Polk v. Gallant*, *supra*, it was held, the *sureties* of the purchaser of land at Clerk & Master's sale, finding that the principal was insolvent, had an equity which they could enforce against the land, even before payment of this liability; but, in the meantime, the purchaser had sold his interest (an equity) to a third party, *without notice* of the unpaid purchase-money. The equity of the securities was held superior, for the reason that it was the "elder," and that the doctrine of *notice* did not apply; in other words, the fact that the claimant of the second equity had no *notice* of the equity of a prior date made no difference, because the "elder" must prevail, to use the language of the court in those cases.

There were no facts and circumstances in this as in that of *Rice v. Rice*, already mentioned, which would change the *priority*. In other words, nothing appeared but what the "elder" equity was *equal in all other respects*; therefore, *qui prior est tempore, potior est jure*.†

Another example is given from the books of this rule, namely:

* *Green et al. v. Crockett et al.*, 2 Dev. & Bat. Eq., 390; *Polk v. Gallant*, 2 Dev. & Bat. Eq., 395; *Shaffner v. Forgleman*, Winston, Eq., 12. The purchase of an equitable title must abide by the case of the person from whom he buys, and will be entitled to all his remedies. *Craig v. Leiper*, 2 Yerger, 193; 9 John., 463; Sugd., 520; *Polk v. Gallant*, *supra*; *Tharp v. Dunlap*, 4 Heisk., 674.

† But almost the same language of the North Carolina courts was used in other English cases, notably Lord Westbury, in the noted case of *Phillips v. Phillips*, 4 De G., F. & J., 208, 215. The language used: "Grantees and incumbrancers in equity take and are ranked according to the dates of their securities." "The first grantee is *potior*, that is *potentior*. He has a better and superior equity, because a prior equity." See, also, *Carey v. Eyre*, 1 De G. & J. S., 149.

as in a large number of the States the interest of a mortgagee of lands is purely equitable, unaccompanied by any legal estate; if, in those States, an owner of land, A., should give successive mortgages upon it, each for a valuable consideration, such mortgages would be entitled to a priority in the order of time, had not the registration laws changed the operation of this rule, for the failure to register on the part of the *prior* mortgagee would give *preference* to a subsequent one *when* registered. If *all* the mortgages remained without registration, the doctrine would apply, and the "elder" would prevail, where *equal in all other respects*.

It is observable, therefore, that the system of registration in this country has greatly interfered with the equitable doctrine here discussed.

We come now to the second maxim, namely, "*Where there is equal equity the law must prevail.*"

The meaning is this: if two persons have *equal* claims or interest in the subject-matter, each is equally entitled to the protection of a court of equity with respect to this equitable interest; and one of them, in addition to his equity, also obtains the *legal* title in the subject-matter; then he who has the *legal* estate will prevail. In this case a court of equity might refuse to interfere, and leave the parties to a court of law, where, of course, the legal estate would be recognized.* It will readily be seen that the facts indicated above, in the definition of the second rule, are sufficient to change the operation of the first rule.

In other words, the second rule supplements the operation of the first by applying to it additional facts. This *obtaining the legal title* may change the *priority*, as might the failure to register by the *prior* incumbrancer. Equity aids the vigilant, and not those who slumber on their rights.

But the most frequent and important application of this principle is the doctrine that when a man purchases property for a valuable consideration, and, without notice of a prior equity in the same subject-matter, he obtains the legal title in addition to his equitable claim, he becomes, in general, entitled to priority both in law and equity.†

* *Fitzsimmons v. Ogden*, 7 Cranch, 218; *Newton v. McLean*, 41 Barber, 285; *Turner v. Pettigrew et al.*, 6 Hump., 438.

† 2 Eq. Lead. Cas., 102, 109; 2 Ves., 454; *Vattier v. Hinde*, 7 Pet., 252; *Boone*

From what is here said it will be seen that the doctrine of notice does not apply where equities are *equal*, because in that case the subsequent claimant may have purchased *without notice* and for valuable consideration, yet the holder of the *first* equity will prevail. He buys only the right of his own vendor, and some quality imparting to his estate or interest an intrinsic superiority would be necessary to give him a preference.* And in this country the registry acts would give the subsequent equity the very quality which imparts to it an intrinsic superiority over the equitable title not recorded as required by these acts.

Notice does not Apply to Legal Estates.—Among purely *legal* titles to the same subject-matter the equitable doctrine of priorities growing out of the presence or absence of notice, or of valuable consideration, or of any other incident, has no application or effect. Such legal titles, estates, and interests are, in the absence of statutory regulation, controlled with respect to their priority by the order of time.

The "*oldest*" title will prevail, and the subsequent purchaser cannot avail himself of the position of a *bona fide* purchaser without notice and for valuable consideration. Thus if A. conveys to B. in fee, and afterwards executes a deed to C. for the same land, at law C. can have no title, as nothing was left in A. to convey; and this is so, although C. had no knowledge of the conveyance to B.†

At common law the mere want of a valuable consideration in the *prior* conveyance affects the priority of legal right resulting from priority of time. So A., owning land, might convey, as a mere gift to B., by a conveyance sufficient in kind and form to transfer the legal title, and so that no trust should result to himself, and should subsequently execute a deed in fee of the same land to C., who would pay a valuable consideration therefor, C. would take nothing at common law. The prior conveyance to

v. Chiles, 10 Id., 177; Rexford v. Rexford, 7 Lan., 6; Rowan v. State Bank, 45 Vt., 160; 6 Hump., 433; Wilson v. W. N. C. Land Co., 77 N. C., 445; Rollins v. Henry, 78 N. C., 342.

* Boone v. Chiles, 10 Pet., 177; Shirras v. Gaig, 7 Cranch, 34, 43; Sumner v. Waugh, 56 Ill., 531; cases cited *supra*.

† Gaines v. New Orleans, 6 Wall. (U. S.) R., 642; Ruckman v. Decker, 23 N. J. Eq. (8 C. E. Green), 233; 2 Pomeroy's Eq. Jur., § 679 (notes); Jones v. Jones, 8 Sim., 633.

B. would exhaust and transfer the entire fee, as though a valuable consideration had been paid, and no interest would be left on which C.'s deed would operate. The fact that C. paid value, and was ignorant of the former conveyance, could not destroy the legal effect of the prior deed. It was, doubtless, in consequence of this rule of the common law in regard to purely legal conveyances, that acts of Parliament and acts of the legislature have been enacted with great care, with a view to prevent fraud, to stimulate diligence, and to better subserve the ends of justice.

The first and most important act of Parliament on this subject was that of 27 Eliz., ch. iv., by which grants of lands, made for the purpose of defrauding subsequent purchasers, are declared void as to such purchaser who purchases for a valuable consideration. Under this statute the common-law rule, as stated in the above case, was changed, and it was held that the voluntary deed of conveyance or deed of gift to B. was void as to C., who paid a valuable consideration, even with notice of the voluntary deed.

Then, again, the statute of 13 Eliz., ch. v., had provided that all conveyances of *lands* or *chattels*, made for the purpose of defrauding creditors, should be void as to such creditors and their representatives.

There was a provision in this act of 13 Eliz. that the same did not extend to any conveyance made in good faith and for a valuable consideration to a person not having notice of the fraud. Similar statutes have been passed in the American States. As to the force and effect of these statutes see the cases* cited in foot-note. Then we have recording acts, and acts requiring the docketing of judgments, which have their effects different, according to the meaning of the particular act. Thus, in North Carolina, the registration acts only make trust deeds and mortgages take effect from the date of registration; but, as to deeds conveying the fee absolute, the statutes allow them to be registered within

* *Twyne's Case*, 3 Coke R., 80; 1 Smith Lead. Cas., 33 (7 Am. ed.); *Sexton v. Wheaton*, 8 Wheat., 229; *Doe v. Manning*, 9 East R., 59; 18 Ves., 84. See Bankruptcy and Insolvency Acts of the several States, which made certain deeds void. Also, the Registration Laws, giving *priority*. But all the registrations do not apply in this strict sense to legal conveyances, but only to such as convey an equitable estate. See statutes of North Carolina and Tennessee, as examples of many others in this regard.

two years, and they are not made void in terms by any contingency. So that a subsequent purchaser from the same vendor, even without notice, would be bound by the prior conveyance on two grounds:

1. That in law, among successive, purely legal conveyances, the first in time has preference (as has been shown).

2. That, while a perfect legal title does not pass, by virtue of the unregistered deed, within the two years or afterwards, yet it is a defective conveyance, and the first bargainee has an equity prior in time to a subsequent purchaser from the same vendor, especially with notice of the equity; possibly in *this* case the same result would follow without notice.

But as to the doctrine of equitable *priority*. Having assumed that equities may be *equal*, the converse proposition is implied, that equities may be *unequal*; and, if so, the *priority* may be changed. What is an *unequal* equity? Answer with this illustration:

1. An equitable interest, created by a trust, or contract *in rem*, made upon valuable consideration, is *superior* to the equity arising from a mere-voluntary transfer—a mere gift, or from a mere judgment-lien, which is general in its nature, and is analogous to the claim of a donee. Thus the beneficiary under a trust, the vendee under an agreement to convey, the holder of a lien created by a contract *in rem*, deals concerning the specific thing; he parts with the consideration upon the security of that specific thing; he obtains an equitable interest in the specific thing. The judgment-creditor has not dealt and given credit on that specific thing; he has not parted with value in direct reference to this thing; his lien is general, and not confined to it. The lien of the judgment only extends to what his debtor really has,—that is, to the thing subject to all the equities in it existing at the date of the judgment.* From the very nature of these interests the inferiority of one over the other is obvious.

They are, therefore, *unequal* equities.

2. Equities may be made *unequal* by the fraud of one party or the other. Thus the equity acquired by a party who has been misled should be superior to the interest of the one on the same subject-matter who wilfully procured or suffered him to be mis-

* 2 Pomeroy's Eq. Jur., § 685 (note 4), vol. i., §§ 146, 149, 161.

led. So if a man, by the suppression of a truth which he was bound to communicate, or by the suggestion of a falsehood, cause prejudice to another who has a right to a full and correct knowledge, his claim should be postponed to that of the person whose confidence was induced by the representation.*

3. And by *negligence*. The rule would extend to gross negligence, which is held tantamount to *fraud*. And so an equity, otherwise equal, and even prior in time, may, through gross laches of its holder, be postponed to a subsequent interest which another person was enabled to acquire in consequence of such *negligence*. And the following example is given in one of the reports: A., a mortgagee of a leasehold estate, having the lease in his possession, loaned it to the mortgagor for the purpose of enabling him to obtain a further loan upon its security, but told the mortgagor to inform the person of whom he should borrow that money that he, A., had a prior lien. The mortgagor borrowed a sum from his bankers, and deposited the lease with them as security, without informing them of A.'s mortgage. It was held that as A.'s gross negligence had enabled the mortgagor to perpetrate the fraud, his mortgage must be postponed to the lien of the bankers.†

4. *Effects of Notice*.—On this point the idea has been so well expressed by another,‡ that I use his illustration of the rule: "In its practical effects by far the most important rule is that, a party taking with notice of an equity, takes subject to that equity. The full meaning of this most just rule is, that the purchaser of an estate or interest, legal or equitable, even for a valuable consideration, with notice of any existing equitable estate, interest, claim, or right in or to the same subject-matter, held by a third person, is liable in equity to the same extent and in the same manner as the person from whom he made the purchase; his conscience is equally bound with that of his vendor, and he acquires only what his vendor can honestly transfer. The applications of this rule are as numerous as are the various kinds of equitable

* 1 Fonblanque on Eq., p. 64; Evans v. Bicknell, 6 Ves., 174; McKelvey v. Truby, 4 Watts & Serg., 323; 6 Watts, 339; Chapman v. Hamilton, 19 Ala., 121; 2 Pomeroy's Eq., 686 (notes).

† Briggs v. Jones, L. R., 10 Eq., 92. See Garland v. Harrison, 17 Mo., 282; 2 Pomeroy's Eq., § 687 (notes).

‡ 2 Pomeroy Eq., § 688.

interests. The following are some of the most important: A purchaser, with notice of a trust, either express or implied, becomes himself a trustee for the beneficiary with respect of the property, and is bound in the same manner as the original trustee from whom he purchased. A purchaser or mortgagee, with notice of the equitable lien of a vendor for unpaid purchase price, takes the land subject to that lien. A purchaser or mortgagee of the legal estate, with notice of an equitable lien created by a deposit of title-deeds, or by a prior defective mortgage, or by any other means from which an equitable lien can arise, is bound by the lien. A purchaser, with notice of a prior contract to sell or to lease, takes subject to such contract, and is bound in the same manner as his vendor to carry it into execution. These examples are of ordinary occurrence."

The Time of Notice.—In the adjustment of these equities, and in determining when equities are *equal* or when *unequal*, and where notice is one of the incidents, it is important to consider the time when the notice with which the party is charged was received. The facts of the subsequent estate being legal rather than equitable, and of a valuable consideration having been actually paid, must play a most important part in determining the proper time of giving the notice. All the decisions, both English and American, seem to agree that the notice received *before* the party has actually paid the money or parted with other valuable consideration, is binding notice, and subjects his interest to the prior equity of which he thereby has notice; and this is true, although he may have taken the conveyance of the legal title, and given security for the purchase price, even by an instrument under seal.* In England it has been held that the party must have both paid the consideration and taken the conveyance before he received the notice in order to be protected.†

The American authorities all agree that even after the deed is

* *Story v. Lord Windsor*, 2 Atk., 630; *Collinson v. Lister*, 7 De G. M. & G., 634; *Murray v. Ballou*, 1 Johns. Ch., 566; *Renfield v. Dunbar*, 64 Barb., 239; 8 Paige, 361; *Patten v. Moore*, 32 N. H., 382; *Palmer v. Williams*, 24 Mich., 323; *Wilson v. Hunter*, 30 Ind., 466; *Keyes v. Test*, 33 Ill., 316; *Wells v. Morrow*, 38 Ala., 125; 2 Pomeroy Eq. Jur., §§ 691, 750.

† *Wigg v. Wigg*, 1 Atk., 382; 2 Pomeroy Eq. Jur., § 755 (notes 1 and 2).

made and *before* the purchase-money is paid if the notice be communicated he is bound by the notice.

The American authorities are not agreed on the English doctrine on this subject. Perhaps the weight of authority holds that where the purchaser contracts for the legal title, and has actually paid the consideration without notice of any prior claim, and then receives notice of the prior equity, that he *may* take the deed or legal title, and becomes thereby to all intents a *bona fide* purchaser, and is entitled to the protection belonging to that position.* The English authorities also say that where the subsequent vendee has paid a *part* of the consideration, and then receives notice of the prior equity before the whole is paid, he is bound by the notice. And some of the American cases sustain the English view;† others hold that such payment is a protection *pro tanto*. But it should be carefully noted, at this point, that it is the purchaser of the *legal* estate, and who pays the consideration without notice, who obtains the priority. "If the subsequent purchase is of an *equitable* interest merely, without the legal title, a payment of a valuable consideration without notice cannot of itself give the purchaser the precedence over a prior equity of equal standing; the paying of value without notice does not alone constitute a superiority among successive equities, so as to disturb the priority determined by order of time."‡

Of what the Notice must Consist.—It would not be reasonable to say that notice of every species of right or claim will thus affect the estate of the party receiving it. The notice must be of an actual equity, or something which equity regards as an interest in the subject-matter itself. It must be of such a character that if it were clothed, in the hands of its holder, with the legal title, it would be indefeasible.

Concerning Bona fide Purchase for Valuable Consideration without Notice.—This doctrine in its original form was exclusively equitable, but by some of the registry acts and by the ac-

* *Carroll v. Johnston*, 2 Jones Eq., 120; *Baggerly v. Gaither*, 2 Id., 80; *Leach v. Ansbacher*, 55 Penna. St., 85; 14 Ohio, 323; 15 Conn., 307; 24 N. J. Eq., 195.

† *Baldwin v. Sager*, 70 Ill., 503; *Palmer v. Williams*, 24 Mich., 328; *Penfield v. Dunbar*, 64 Barb., 239; *Wormly v. Wormly*, 8 Wheat., 421; 1 John. Ch., 288; 13 Ark., 190; 3 Leigh, 394; 21 Gratt., 313.

‡ 2 Pomeroy Eq. Jur., § 691.

tion of some of the courts, this doctrine of *bona fide* purchase has been made a rule of *law*. It is only proposed here to notice a few general principles, because to follow this important subject into all its details would extend the limits of this chapter beyond the point contemplated by the author. A court of chancery acting solely upon the *conscience* of the litigant parties would always compel the defendant to do what *in foro conscientia* he was bound to do. On the contrary, when the power of this court was invoked to enforce a claim against a defendant, and a state of facts was presented showing that such interference would work injustice to the defendant and would be *against conscience*, then the court would stay its hand and leave the parties to the *law* courts.

Perhaps this is the *rationale* and foundation of the doctrine of *bona fide purchaser*. Thus it is said in *Boone v. Chiles*,* quoting from an English case: "A court of equity acts only on the conscience of the party, and if he has done nothing that taints it, no demand can attach upon it so as to give jurisdiction."

Lord Loughborough, in the case of *Jerrord v. Sanders*,† said: "Against a purchaser for valuable consideration this court has no jurisdiction. You cannot *attach upon the conscience* of the party any demand whatever, where he stands as a purchaser, having paid his money, and denies all notice of the circumstances set up in the bill." I suppose by the expression "the court has no jurisdiction," is meant the court of equity will not "*exercise its jurisdiction*," for it certainly *has* jurisdiction; the equities might be *equal* or *unequal*, and this could only be determined by entertaining jurisdiction.

This doctrine in most cases applies to the *defendant*. It is not a rule of *property*. By which is meant, that in applying the doctrine of *bona fide purchaser* equity does not generally intend to *pass upon and decide the merits of the two litigant parties*. It does not decide that the title of the defendant is valid, and thus intrinsically the better and superior to that of the plaintiff. Indeed the *theory* of the defendant is that the *title of the purchaser is really defective*.‡

* *Boone v. Chiles*, 10 Peters (U. S.), 177, 210.

† *Jerrord v. Sanders*, 2 Ves., 454.

‡ *Wallwin v. Lea*, 9 Ves., 24, 33. In this case Lord Eldon said: "It is not

Statement of the Instances where this Doctrine is available to a Defendant.—The party sued may rely on the plea of *bona fide purchaser*.

1. Where an application is made to an auxiliary jurisdiction of the court by the possessor of the legal title, as by an heir-at-law for a discovery, or by a tenant for life for the delivery of title-deeds, and the defendant pleads that he is a *bona fide purchaser* for valuable consideration, and without notice. In this case the court gives no assistance to the legal title. *This rule would not apply where the court exercises a legal jurisdiction concurrently with the courts of law; as, for instance, in a bill for dower.*

2. The most usual and ordinary is that of several purchasers or incumbrancers, each claiming an *equity*, and one who is *luter* and *last in time* succeeds in obtaining an outstanding *legal estate*; he will not be deprived of this advantage by a court of equity.

3. Where there are circumstances which give rise to an "equity" as distinguished from an equitable *estate*,—as, for example, an equity to set aside a deed for fraud, or to correct it for mistakes, and the purchaser under the instrument maintains the plea of purchaser for valuable consideration, without notice, the court will not interfere.* Under this latter class we find the issue frequently raised, when a bill is filed or suit brought to set aside a fraudulent deed, made so by our statutes, the defendant sets up the plea of *bona fide purchaser*.

But by far the greater number of cases which arise in this country grow out of the second class of cases mentioned in the opinion of *Phillips v. Phillips*.†

worth consideration whether the very principle of the plea is not this: I have honestly and *bona fide* paid for this in order to make myself the owner of it, and you shall have no information from me as to the perfection or imperfection of my title, until you deliver me from the peril in which you state I have placed myself in the article of purchasing *bona fide*."

* *Phillips v. Phillips*, 4 De G., F. & J., 208; 2 Pom. Eq. Jur., §§ 742-3 (otes). The chancellor, who delivered a studied and elaborate opinion in *Phillips v. Phillips*, *supra*, contended that the views expressed in *Attorney-General v. Wilkins*, 17 Beavan, 285, and *Finch v. Shaw*, 19 Beavan, 500, were not in conflict.

† A person acquiring an equitable title only cannot be protected as an innocent purchaser, 10 Yerg., 335; 2 Yerg., 198; 3 Yerg., 408; 2 Head. (Tenn.), 8; 1 Lea, 55. There can be no innocent purchaser of land where the vendor is out

What Constitutes a Bona fide Purchaser for Valuable Consideration, and without Notice.—This proposition might be answered simply, without elaboration, as follows:

1. He must act in good faith.
2. He must part with a valuable consideration.
3. And this without notice of the adverse equitable claim.

But, to explain the meaning more fully, it must be stated. What is a *valuable consideration*? It is obvious that no person who has acquired the legal estate as a mere volunteer, whether by gift, devise, inheritance, post-nuptial settlement on wife or child, or otherwise, can thereby be a *bona fide* purchaser.* *Valuable consideration* means something of actual value, capable in law of an estimate of pecuniary measurement, parting with money or money's worth, or an actual change of the purchaser's legal position for the worse.† If there is an actual value, properly paid in good faith, the amount is not material.‡ The amount grossly small, and totally inadequate, would not be a valuable consideration so as to protect the purchaser, because it would show bad faith.§

It was held in Texas that, paying the price in Confederate money, was not valuable consideration within the rule.||

Other instances of valuable consideration, as "a contempo-

of possession at the date of the conveyance; nor from one who is not *seised of the title*: 2 Yerg., 193; 7 Heisk., 518.

In a case where the vendor has conveyed and reserved no lien for purchase-money he has no prior valid lien against an innocent purchaser, even though the deed was not registered. Being an inchoate legal title, it became perfect on registration: 10 Yerg., 335. An antecedent debt, as the consideration, will not protect purchaser: 3 Head., 719; 2 Hump., 192; 1 Heisk., 734; *Leading Cases in Eq.*, 104; 1 Head, 110; 4 Paige (N. Y.), 215.

* *Willoughby v. Willoughby*, 1 Term R., 763, per Lord Hardwicke; *Jeremy Eq. Jur.*, 253; 10 Ves., 296; *Pomeroy's Eq.*, vol. i., § 200; vol. ii., § 745.

† *Story v. Lord Windsor*, 2 Atk., 630; *Dicker v. Tillinghast*, 4 Paige, 215; *Weaver v. Borden*, 49 N. Y., 286; *Delaney v. Stearns*, 66 N. Y., 157; *Westbrook v. Gleason*, 79 N. Y., 23; *Munn v. McDonald*, 10 Watts, 270; *Roxborough v. Messick*, 6 Ohio Stat., 448; *Palmer v. Williams*, 24 Mich., 328; *Brown v. Welch*, 18 Ill., 343; *McLeod v. Nat. Bk.*, 42 Miss., 99; *Aubochon v. Bender*, 44 Mo., 560; *Spurlock v. Sullivan*, 36 Tex., 511.

‡ *Wood v. Chapin*, 13 N. Y., 509; 52 N. Y., 133; *Westbrook v. Gleason*, 79 N. Y., 23, 36.

§ *Worthy v. Caddell*, 76 N. C., 82.

|| *Sutton v. Sutton*, 39 Tex.; *Willis v. Johnson*, 38 Tex., 303.

aneous advance or loan of money, or a sale, transfer, or exchange of property, made at the time of the purchase, or execution of the instrument, the surrender or relinquishment of an existing legal right, or the assumption of a new, legal obligation, which is in its terms irrevocable.”*

Antecedent Debts.—It is well settled that a *security* for the satisfaction of an antecedent debt, such as a conveyance in trust for that purpose, does not render the transferee a *bona fide* purchaser. In this case he parts with no value, surrenders no right, and places himself in no worse legal position than before.†

The rule has been thus settled in most of the States.‡

But where the consideration consisted of part money actually paid, and the residue of antecedent debt satisfied, the whole has been held to constitute a valuable consideration.§

In California and Indiana it has been held that the securing of a pre-existing debt is a valuable consideration.|| Whether the complete satisfaction or discharge, the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be valuable consideration, is a question of diversity of opinion among the cases. Mr. Pomeroy thinks “the affirmative is supported by the numerical weight of the authority.”¶

Extending time has been held a valuable consideration.** If,

* *Westbrook v. Gleason*, 79 N. Y., 23; *Williams v. Shelley*, 37 N. Y., 375; 42 Miss., 99.

† One who claims against a prior donee or creditor, as a purchaser for value, must prove a fair consideration, not up to full value, but such a price as will indicate a clear absence of surprise, undue advantage, or fraud. *Worthy v. Caddell*, 76 N. C., 82.

‡ *Alexander v. Caldwell*, 55 Ala., 517 (mortgage for pre-existing debt); *Johnson v. Graves*, 27 Ark., 557; *Cary v. White*, 52 N. Y., 138; *Clark v. Flint*, 22 Pick., 231; *Ashton's Appeal*, 73 Penn. Stat. (23 P. F. Sm.), 153; *Prentice v. Zane*, 2 Gratt., 262; *Halstead v. Bk. of Ky.*, 4 J. J. Marsh., 554; *Manning v. McClure*, 36 Ill., 490; 23 Miss., 136; 36 Tex., 511; 26 N. J. Eq., 445; 6 Paige, 457; 23 Ill., 579 (but see *Doolittle v. Cook*, 75 Ill., 354).

§ *Baggerly v. Gaither*, 2 Jones Eq., 80; 15 N. Y., 11, 179; 24 Pick., 221.

|| *Frey v. Clifford*, 44 Cal., 335; *Babcock v. Jordan*, 24 Ind., 14.

¶ Satisfaction and discharge is valuable consideration: *Soule v. Shotwell*, 52 Miss., 236 (said to be the settled rule in Mississippi); *Ruth v. Ford*, 9 Kan., 17; *Wade's Exrs.*, 51 Ala., 214; 23 Ill., 579; *Donaldson v. Bk. of Cape Fear*, 1 Dev. Eq., 103.

** *Cary v. White*, 52 N. Y., 138; *Pratt v. Carman*, 37 N. Y., 440; 22 N. Y., 562.

however, the creditor surrenders up or cancels some written security, such act becomes a valuable consideration, and makes him a *bona fide* purchaser.*

It is very generally settled that an assignment made by a debtor in trust for the benefit of his creditors is not a conveyance such as will protect the assignee nor the creditors as *bona fide* purchasers.† Judgment-creditors are not "purchasers" within the meaning of the registry acts, and, unless expressly put on the same footing, they do not obtain the benefit which a *bona fide* subsequent purchaser does by the prior record.

The Consideration must be Paid before Notice of Adverse Lien or Equitable Claim.—Notice after the agreement for the purchase is made, and before payment of the consideration, will destroy the character of *bona fide* purchaser.‡ In England the entire price must be paid before any notice, and the same is required by some of the American courts.§ But in others of the States the rule is different, as has been seen.||

The Payment must be Actual.—The promise, contract, bond, covenant-bond, and mortgage, or other non-negotiable security for the price, will not render the party a *bona fide* purchaser.

For, on a failure of consideration, he can be relieved from such obligations in equity, if not in law.¶

The payment need not be actual cash, but the assumption of

* *Youngs v. Lee*, 12 N. Y., 551; 10 *Paige* (N. Y.), 170; *Goodman v. Simons*, 20 How. (U. S.), 343, 371; *Ingram v. Morgan*, 4 Hump., 66.

† *Clark v. Flint*, 22 Pick., 231; 17 N. Y., 28; 17 Id., 580; *Haggerty v. Palmer*, 6 Johns. Ch., 437; *Spackman v. Ott*, 65 Penn. St., 131.

‡ 2 *Pomeroy Eq. Jur.*, § 750 (notes).

§ *Tourville v. Naish*, 3 P. Wms., 307; *Jewett v. Palmer*, 7 Johns. Ch., 65; 3 Stocket, 246.

|| In these States cases are found where the prior incumbrancer was guilty of negligence or laches, or the subsequent purchaser had made valuable improvements on the land before notice. In these cases the defendant was allowed the sum paid refunded before the plaintiff's equity should take effect. The judgment may be adapted to the peculiar facts of the case. *Baldwin v. Sager*, 70 Ill., 503; *Kitteridge v. Chapman*, 36 Iowa, 343; 21 N. J. Eq., 118; 25 Mo., 156; 32 Tex., 294; 8 *Paige*, 361. In *Youst v. Martin*, 3 Serg. & R., 423, the reasons for the American modification are fully stated by Tilghman, C. J.

¶ *Roseman v. Miller*, 84 Ill., 297; *Spicer v. Waters*, 65 Barb., 227; *Haughwout v. Murphy*, 21 N. J. Eq. (6 C. E. Green), 118; 4 *Paige*, 215; *Jewett v. Palmer*, 7 Johns. Ch., 64, 68; *Weaver v. Borden*, 49 N. Y., 236; *Westbrook v. Gleason*, 79 N. Y., 23, 28.

an irrevocable obligation, from which the purchaser could obtain no relief in case of failure of title, may be sufficient. So the unconditional transfer of notes or bonds, or other securities made by third persons, will have the effect of payment within this doctrine. The cases* referred to in foot-note will indicate the character of such transactions which will protect the purchaser. In some cases the purchaser is protected by such an undertaking to pay the debt of the vendor to a third party in such a manner as to be substituted as the debtor in place of the vendor; in other words, such a contract as amounts to a *novation*.†

Effect of Notice.—The doctrine of notice, both *actual* and *constructive*, has already been discussed in this chapter, but, as it especially affects a purchaser claiming to be an *innocent* purchaser, it may be sufficient to say, in the language of another: "The rule is universal and elementary that, if a purchaser in any form receives notice of prior adverse rights in and to the same subject-matter, before he has completely acquired or perfected his own interests under the purchase, his position as *bona fide* purchaser is thereby destroyed, even though he may have paid a valuable consideration; on the other hand, notice given after his interests have been completely acquired or perfected, produces no injurious effect. Notice sufficient to prevent the purchase from being *bona fide* may inhere in the very form and kind of the conveyance itself. On this ground it is held by one group of authorities that a grantee *taking* or *holding* under a *quitclaim* deed, cannot be a *bona fide* purchaser, but this conclusion is rejected by other decisions."‡

There are other instances, where the form of the conveyance,

* *Baldwin v. Sager*, 70 Ill., 503; *Partridge v. Chapman*, 81 Ill., 137; *Frost v. Beekman*, 1 Johns. Ch., 288.

† See, on this point, *Jackson v. Winslow*, 9 Cow., 13; *Frost v. Beekman*, 1 Johns. Ch., 288.

‡ The following cases hold that a grantee, taking under a *quitclaim* deed, cannot be a *bona fide* purchaser; that such a deed is *ipso facto* notice of all the defects in the title: *Munn v. Best*, 62 Mo., 491; *Kearney v. Vaughn*, 50 Mo., 284; 59 Mo., 444; *Oliver v. Piatt*, 3 How. (U. S.), 333; *May v. Le Claire*, 11 Wall., 217; 42 Me., 502; 42 Iowa, 48; 42 Id., 482.

The following cases hold the opposite view, namely, that there is no difference between holding under a *quitclaim* deed and any other species of conveyance: *Chapman v. Sims*, 53 Miss., 154; *Corbin v. Sullivan*, 47 Ind., 356; 15 Kansas, 133.

or the *nature of the interest*, may and does have the effect in equity to destroy the position of *bona fide* purchaser, as, for instance, the assignee of the vendee in a land contract, the purchaser of a mere *equitable* title, the vendee in possession under a land contract buying a better title than his vendor's; where a trustee purchased at his own sale; the assignee of a mortgage (except in those States where the mortgage creates a *legal* estate). There are other instances, of frequent occurrence, namely, where the deed or mortgage, or other assurance of title, reserves upon its face a benefit or trust to the advantage of the vendor or mortgagor, which tends to "hinder, delay, or defraud creditors," or any other provision in the deed which has the effect to produce an inference of law that the intention is fraudulent, then the vendee or purchaser, being a *party* to the deed, is affected with notice of the contemplated fraud, and, of course, the purchase could not be *bona fide*.* This class of cases will be more fully noticed when we come to treat of Fraudulent Conveyances.†

Second Purchaser without Notice from the First Purchaser with Notice.—If the title to land, having passed through successive grantees, and subject in the hands of each to a prior equity, comes to a purchaser for value, and without notice, it is at once freed from these equities; he obtains a valid title by virtue of the *bona fides*, valuable consideration, and *absence* of notice. So, if the *first* purchaser be charged with notice, so as to render the title subordinate to another, yet the *second* purchaser, or any other subsequent holder taking without notice, obtains the title; but, if the party, thus holding the estate discharged of the equities, should convey the same estate back to one of the previous parties charged with notice, the estate in this *vendee's* hands stands charged

* If the deed upon its face shows fraud, then the purchaser is affected thereby as a matter of law: *Summers & Brown v. Boos & Co.*, 2 American Rep., 661; *Starke v. Etheridge et al.*, 71 N. C., 247; *Hardy v. Simpson*, 13 Ire., 132. The fraud must affect the contract, and, therefore, both parties to the deed must participate in the fraud: *Lassiter v. Davis*, 64 N. C., 498; 67 N. C., 63; *Ib.*, 185.

† *Cheatham v. Hawkins*, 76 N. C., 335. And, if not fraudulent in law appearing upon the face of the deed, the proof may fix a notice of the fraud or trust; these facts being found by a jury, the court will declare the same fraudulent in fact and law: *Lukins v. Aird*, 6 Wall. (U. S.), 78; *Lyons v. Aiken*, 78 N. C., 258; *Pomeroy on Specific Performance*, p. 530.

with the prior trust, as though the estate had never passed from him.*

There is another rule, which is an inference of the doctrine stated, namely: "*If a second purchaser with notice acquires title from a first purchaser, who was without notice, and bona fide, the second succeeds to all the rights of his immediate grantor.*"

It seems that, when the estate once comes, freed from equities, into the hands of a *bona fide* purchaser, he obtains a complete *jus disponendi*, with exception mentioned where the conveyance is to a *previous* holder with notice, and it is said may transfer a perfect title, even to volunteers.†

If the *first* purchaser, however, even *without notice*, should be a mere *volunteer*, and, therefore, did not hold the land free from equities, the second purchaser would take subject to the equities.‡

As to Time of Notice.—Reference has already been made to this *requisite* in the doctrine of notice in this chapter. It will be remembered that the English doctrine and the American is at variance as to the *time* when a second or further-removed purchaser shall have notice, the former holding that even after the full consideration had been paid and notice be received, that he cannot *perfect* the transaction by taking a deed, while the American authorities hold that notice is sufficient *before* the *price* is paid, although the deed may have been made, but if the *price* be fully paid *before notice*, then he can take the deed.

But on the last idea suggested, Mr. Pomeroy thinks it has the following limitation: "It means where a party has acquired the equitable *estate* by means of a conveyance which purported to *convey the land itself*, and has received the instrument and paid the consideration without notice of a prior claim, that he can,

* *Parris v. Lewis*, 85 Ill., 597; *Pringle v. Dunn*, 37 Wisc., 449; *Price v. Martin*, 46 Miss., 489; 3 Johns. Ch., 129, 147; 24 Pick., 221; *Tompkins v. Powell*, 6 Leigh, 576; 8 Cow., 260; 14 Mass., 296; 10 Me., 210; 6 Ala., 801; 1 Johns. Ch., 213, 219; 6 Barb., 373; 73 Penn. St., 153; 24 Wisc., 671.

† *Allison v. Hagan*, 12 Nev., 33; 27 Wisc., 449; *Moore v. Curry*, 36 Tex., 668; *Fletcher v. Peck*, 6 Cranch (U. S. R.), 87; *Alexander v. Pendleton*, 8 Ibid., 462; *Vattier v. Hind*, 7 Pet. (U. S.), 252; *Boone v. Chiles*, 10 Pet. (U. S.), 177; 1 Johns. Ch., 213; 6 Paige, 323; 46 Barb., 211; 13 Mass., 493; *Holmes v. Stout*, 3 Green Ch., 492; *Lindsey v. Rankin*, 4 Bibb, 482; 6 Mon., 192, 198.

Both these rules apply to cases under the recording or registration acts. Pomeroy, Eq. Jur., § 754 (notes).

‡ *Johns v. Sewell*, 33 Ind., 1; see, also, *Blatchly v. Osborn*, 33 Conn., 226.

after notice, procure the *legal title*, and with it the protection of a *bona fide* purchaser. But where a party has acquired *only* the equitable lien or interest, not by conveyance, and has advanced the consideration without notice, he *cannot, after* notice, get in the legal title and thus obtain a precedence over a *prior* equity.”*

This explanation of Mr. Pomeroy tends to explain the apparent contradiction in the American authorities. This leaves the doctrine, that *between simple equities* the first in time is the better, in full force. If he only has an equity, and while he has paid value without notice for such equity, the subsequent purchaser, nevertheless, holds in subordination to the prior equity, but then, *after* notice, he cannot take the legal title and thereby change the priority. But under the American doctrine, if he *contracts* for the legal, and absolutely pays the consideration without notice, he may then, after notice, receive the legal title and be protected. So, as explained by Mr. Pomeroy, if, thinking he had bought the legal title, he took a conveyance purporting to convey the legal title, which in fact it did not, then, it being the legal title *actually* bought as between the parties, he may, *after* notice, take a conveyance which *really* passes the legal title.

The Doctrine of Priority as Affected by the Registration Acts.—Some further reference to this question is necessary in this place. This original doctrine of *priority* is a creature of the court of equity, and therefore administered in that court; but the object of registration being to prevent fraud, it has laid hold of this great question and applied it to *legal estates*. Most of the registration acts make not only mortgages and trust deeds void before registration, as to subsequent *bona fide* purchases, but *deeds in fee* likewise, the provision in several of the statutes being slightly different as to mortgages and deeds,† the result of which is, that where A. and B. have each obtained a deed from the same vendor, B., the subsequent purchaser will get a better title by the first registration. On this point Mr. Pomeroy further says: “Although the statutes pronounce unrecorded deeds and mortgages to be void as against subsequent purchasers who have complied with their

* 2 Pomeroy's Eq. Jur., § 756.

† Jackson v. Post, 15 Wendell, 588. See N. C. Registration Acts, Battle's Revisal, ch. xxxv., sec. 1, as to deeds; sec. 12, as to mortgages and trust deeds; sec. 24, as to registration of *contracts to convey*.

provisions, yet, in the practical operation of this legislation, the right created by a prior unrecorded deed is generally regarded as tantamount to an interest, which may, therefore, be cut off by a subsequent purchaser or incumbrancer who is in all respects *bona fide*, and who has obtained the first record. The total effect of the system is thus twofold; it both enlarges the scope of the doctrine concerning *bona fide* purchase, by extending it to all those instruments, *legal* or equitable, which are required or permitted to be recorded, and it adds to the elements constituting a *bona fide* purchaser the further requisite of registration.* So that under these registration acts the subsequent purchaser must,—1, act in *good faith*; 2, pay a valuable consideration; 3, without notice; 4, he must have the instrument under which he holds recorded.†

It has been heretofore mentioned that in Ohio and North Carolina‡ the courts have held, in construing the somewhat special language of the local statutes, that notice, whether actual or constructive, of a prior unrecorded instrument, shall not affect the precedence acquired by the earlier record of a subsequent conveyance or mortgage.§

Purchaser at Judicial Sale Protected under the Registration Acts—Also Purchasers from the Heir.—Although it has been

* 2 Pomeroy Eq. Jur., § 758.

† Jones on Mortgages, vol. i., §§ 570–573; Hine v. Dodd, 2 Atk., 275; 16 Vesey, 419; Ford v. White, 16 Beavan, 120; Beal v. Gordon, 55 Me., 482; Tucker v. Tilton, 55 N. H., 223; George v. Kent, 7 Allen, 16; White v. Foster, 102 Mass., 375; Hamilton v. Nutt, 34 Conn., 501; Jackson v. Van Valkenburg, 8 Cow., 260; Jackson v. Post, 15 Wend., 588; Fort v. Burch, 5 Denio, 187; Goelet v. McManus, 1 Hun. (N. Y.), 306; Smallwood v. Lewin, 15 N. J. Eq., 60; Gibbs v. Cobb, 7 Rich. Eq., 54; Nelson v. Dunn, 15 Ala., 501; 48 Miss., 493; Myers v. Ross, 3 Head. (Tenn.), 60; 51 Ill., 127; 5 Ore., 313.

‡ This is the way Mr. Pomeroy understands the North Carolina doctrine, but, in reference to the case of Robinson v. Willoughby, it will be seen that Judge Reid restricts this holding to “deeds of trust” and “mortgages,” and thus leaves the general doctrine applicable to all other cases, including the question of fraud, which may be shown as a reason for not recording in apt time.

§ Barcaw v. Cockerill, 20 Ohio St., 163; Mayham v. Combs, 14 Ohio, 428; Stansell v. Roberts, 13 Ohio, 148; Flemming v. Burgin, 2 Ire. Eq., 584; Robinson v. Willoughby, 70 N. C., 358. As to a curious and interesting conflict between holders of titles purporting to convey title as affected by the doctrine of notice, priority, registration, etc., see a very late case in New York, Page v. Waring, 76 N. Y., 463, referring to Cook v. Travis, 20 N. Y., 400.

often held that the subsequent purchaser, who relies on the plea of innocent purchaser, must be one who purchased of the *same vendor*, under the registration acts, a purchaser at execution or judicial sale, as well as a purchaser from the heirs of the vendor, is protected by showing the requisites of a *bona fide* purchaser. It is held in these cases, of course, that the general judgment lien of a subsequent date is inferior to the equity of an unregistered deed, but, if a sale is had, and a party buys in good faith, pays a valuable consideration, without notice, he gets a valid title as against a prior unregistered deed of the debtor. The purchaser at execution sale, therefore, is within the meaning of the expression "subsequent purchaser" in the registry acts.* But a purchaser at sheriff's sale, who has notice of a prior unregistered deed, takes the property subject to the prior lien.† In such a case, the sheriff's deed has no greater effect than a quitclaim from the defendant at the time, and having notice of the unregistered deed, he buys with full knowledge, and is not, therefore, a *bona fide* purchaser. And in such a case, the lien of the judgment is of no force by way of giving priority; it is the sale which is regarded as effectual, and the lien is not regarded as an incumbrance, but only an ingredient in the conveyance. See *Sieman v. Schurck*, in the note.

In some of the States the judgment-lien is made superior to an unrecorded instrument; in cases of this kind it is held that if the judgment is enforced, and the land sold and conveyed to a purchaser who has notice of the *unrecorded deed*, or prior incumbrance, the superiority of the lien still continues and attaches to the conveyance. In such cases, the judgment-creditor by the statutory peremptory lien of his judgment, any notice he might thereafter have could not affect that right, nor would it be affected by a transfer to a purchaser having notice.‡

* *Ehle v. Brown et al.*, 3 Wis., 405; *Hodson v. Treat*, 7 Wis., 263; *Jackson v. Chamberlain*, 8 Wend., 625; *Den v. Rickman*, 1 Green (N. J.), 43; *Kennedy v. Northrop*, 15 Ill., 148; *McClure v. Tallman*, 30 Iowa, 515; 30 Wis., 443.

† *Sieman v. Schurck*, 29 N. Y., 598; *Jackson v. Post*, 15 Wend., 588; see also 2 Pomeroy, Eq. Jur., § 724, note 1.

‡ *Jacques v. Weeks*, 7 Watts, 261; *Calder v. Chapman*, 52 Penn. St. (2 P. F. Sm.), 359; *Massey v. Westcott*, 40 Ill., 160; *Smith v. Jordan*, 25 Ga., 687; *Fash v. Ravesties*, 32 Ala., 451; *Henderson v. Downing*, 24 Miss., 106; *Greenleaf v.*

Then, again, under the registry acts, it has been held that a deed from the heir is superior to an unrecorded deed from the ancestor, when made to a party without notice.

In other words, a party who purchases (*bona fide*, and for value without notice) of the heir, is a "subsequent purchaser" within the meaning of the registry acts.* The opposing argument was made that the ancestor having made the deed nothing could pass to the heir, but this might, with equal force, be said of the *second* conveyance to any other party by the same vendor. It is the result of the recording acts.

How the Priority stands when the Judgment-creditor is the Purchaser.—It is held that the lien of a vendor for unpaid purchase-money could be enforced against a person who had bid in the property under his own judgment, who took sheriff's deed *without* notice. He was considered not to be a purchaser for value, as he paid no new consideration.†

Purchase-money Mortgages.—This is given as an instance of intrinsic superiority of lien.‡ The reason given for this by the Supreme Court of Illinois, in the case of *Curtis v. Root*,§ is as follows: "It is a principle of law too familiar to justify a reference to authorities, that a mortgage given for the purchase-money of land, and executed at the same time the deed is executed to the mortgagor, takes precedence of a judgment against the mortgagor. The execution of the deed and mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands and vests in the mortgagee, without stopping at all in the purchaser, and during this instantaneous passage, the judgment-lien cannot attach to the title. This is the reason assigned by the books why the mortgage takes precedence of the judgment, rather than any

Edes, 2 Minn., 264; *Potter v. McDowell*, 43 Mo., 93. The result of these cases, being in direct opposition to the universally recognized doctrine concerning the effect of notice upon the rights of purchasers, is in most instances supposed to be the imperative language of the recording acts.

* *McClure v. Tallman*, 30 Wis., 515; *McCullough v. Eudaly*, 3 Yer., 346; *Powers v. McFerrin*, 2 Serg. & R., 44.

† *Arnold v. Patrick*, 6 Paige, 310.

‡ 1 Jones on Mortgage, § 464-66.

§ *Curtis v. Root*, 20 Ill., 53; this provision applies only to mortgages executed by the grantee directly to his grantor, and not to those executed to third persons as security for money loaned for the purpose of paying the purchase-price: *Henisler v. Nickum*, 38 Mo. 270; *Stansel v. Roberts*, 13 Ohio, 148.

equity which the vendor may be supposed to have for the purchase-money."

The purchase-money mortgage not only takes precedence of a prior judgement, but also cuts off or prevents the attachment of any other lien upon the premises which might otherwise have affected it in the hands of the vendee; as, for instance, a lien for work and materials furnished, or a mechanic's lien for a building erected, on behalf of the grantee, after purchase was arranged, but before the deed and mortgage were executed.* So it would have preference over a contract concerning the premises made by the grantee before the purchase.† The purchase-money mortgage would have preference over the claim for homestead by the grantee.‡

Good Faith Necessary.—Although the defendant who seeks to avail himself of the defence of *bona fide* purchaser, may show the payment of a valuable consideration, and the entire *absence* of notice, yet if the transaction is wanting in "good faith" the defence is not available.

It is true that the completion of the contract or making the same *after* being charged with notice would constitute a want of good faith, but the requisites of good faith extend much farther. He may commit a fraud in the transaction with his own immediate vendor or grantor, or he may participate in a fraud against the creditors of the vendor, or he may obtain the transfer through misrepresentations or concealments, which are inequitable, although not amounting to positive fraud, and the like; all of which will destroy his position as "*bona fide*," purchaser. In short the party claiming to be a *bona fide* purchaser must come into court with absolutely clean hands.§

The Mode and Substance of the Pleading this Defence of Bona fide Purchaser.—In the regular equity procedure the defence was in three different ways. If the fact that the defendant is a *bona*

* 2 Pom. Eq. Jur., § 725; *Virgin v. Brubaker*, 4 Nev., 31; *Guy v. Carriere*, 5 Cal., 511; *Strong v. Vandusen*, 23 N. J. Eq. (8 C. E. Green), 369.

† *Bolles v. Carli*, 12 Minn., 113; *Morris v. Pate*, 31 Mo., 315.

‡ *Hopper v. Parkinson*, 5 Nev., 233; 16 Kansas, 54; *Carr v. Caldwell*, 10 Cal., 380; *Magee v. Magee*, 51 Ill., 500; 29 Mich., 298; *New England Co. v. Merriam*, 2 Allen, 391; *Lane v. Collier*, 46 Ga., 580.

§ 2 Pomeroy Eq. Jur., § 591.

fide purchaser for value without notice is clearly shown by the bill of complaint, the defendant may resort to a *demurrer*.*

The other modes are by *plea* or *answer*, the most usual being by "*plea*," and if it contains the requisite averments and they are established by evidence, the suit will be dismissed without the necessity of answer to the merits.

But the defendant in the chancery practice can set out the facts constituting the defence in his *answer*.† If he fails to file "*plea*" or make defence in the *answer*, no evidence can be heard, nor the issue raised in a subsequent stage of the suit.

Under the "code system" of pleading, it could only be raised on *demurrer* or by *answer*. And the defence seems plainly "new matter" within the meaning of the codes, and therefore should be pleaded specially, not being admissible under an answer of general or special denials.

What the "Plea" or "Answer" must contain.—The allegations of the "*plea*" or "*answer*" must aver and include all those particulars which constitute a *bona fide* purchaser under the rules of law.

1. He must state the *consideration*, which must have been *fully paid*, and not merely secured.

2. He should deny notice of the equity claimed in the clearest and fullest manner, and this denial is necessary, whether notice is charged in the complaint or not.

3. That the entire transaction was in "good faith."

4. In those States where the registry acts have operation, he must, in addition to the foregoing, state that he has purchased an estate which comes within the recording acts, which *has been* or *may be* recorded to protect his claim under the statute of registration. Many English decisions, and some in America, hold that the defendant should also aver that the grantor was *seised* at the time, or appeared to be seised of the legal estate. In States where this rule prevails, he must plead accordingly.‡

* Mitf. on Eq. Pl., 199.

† With regard to the difference between a "*plea*" and "*answer*," and the advantages of the "*plea*," see Atty. Gen. v. Wilkins, 17 Beavan (Eng. Eq. Rep.), 285; Earl of Portarlington v. Soulby, 7 Sim., 28.

‡ Story v. Lord Windsor, 2 Atk., 630; Brown v. Wood, 6 Rich. Eq., 155; Tomkins v. Anthon, 4 Sandf. Ch., 97; Blight's Heirs v. Banks, 6 Mon., 198; 10 Ohio, 498; 24 Miss., 208; Boone v. Chiles, 10 Peters (U. S.), 177; 8 Cranch,

Among the qualities of a good plea of "innocent purchasers" is the averment that the consideration-money was *bona fide* paid, and the recital in the deed cannot be received in lieu thereof.* What constitutes a fair and valuable consideration must be judged of by the court; he must state *what* he has paid, and the court can judge whether he be a purchaser for valuable consideration. It is not necessary that he should have his deed registered, because the unregistered deed creates not merely an "equity," but an "inchoate legal" title, which may, on registration, be made perfect.† In the case of *Shields v. Turner* it is held, as a result of the registration laws of Tennessee, that the deed is valid between the parties without registration; that, when the vendor executes a deed, he divests himself of his title; no legal or equitable estate remains; he is seised of nothing for the use of the vendee. If title be not perfected in the vendee until registration, it does not remain in the vendor; but, upon registration, the legal title, by operation of law, vests in the vendee from the execution of the deed.

CHAPTER XV.

THE DOCTRINE OF TRUSTS AS APPLIED TO REAL PROPERTY— EXPRESS AND IMPLIED—RESULTANT AND CONSTRUCTIVE.

As the result of the strict rules of the common law, and the more broad and liberal constructions of the courts of equity, we have the anomaly of *two estates* in the same property,—one called the *legal*, the other the *equitable*. In the instances where both

U. S., 462; especially as to the "plea" and authorities, see *Snelgrove v. Snelgrove*, 4 Dessau's Eq., 274; *Blake v. Haywood*, 1 Bailey's Eq., 208; *Carter v. Hoke et al.*, 64 N. C., 348; 16 Vesey, 252; 17 Vesey, 290; *Craig v. Leiper*, 2 Yerg. (Tenn.), 193; *Aiken v. Smith*, 1 Sneed, 304; *Story's Eq. Pl.*, § 662.

* 2 Atk., 244; 3 Atk., 304; *High v. Battle*, 10 Yerg., 335.

† *High v. Battle*, *supra*; *Vance v. McNairy*, 3 Yerg., 171; *Shields v. Turner*, 10 Yerg., 1.

Land, held under an unregistered deed, is subject to execution: *Vance v. McNairy*; *Shields v. Turner*, *supra*; *Prince v. Sykes*, 1 Hawks. (N. C.), 87; *Tolar v. Tolar*, 1 Dev. Eq.; *Morris v. Ford*, 4 Dev. 418.

of these estates attach, the holder of the *legal* estate is called a "trustee," and the holder of the equitable estate is called *cestui que trust*, or "beneficiary." This equitable estate, in the contemplation of a court of equity, is not a mere right of action,—not a mere right to certain equitable remedies, but is *property* capable of sale, transfer, and devise. It has been held that where a party has been induced to make a conveyance under such circumstances as would give him a *right* to have the same set aside for fraud, the party thus *defrauded* has such an interest as will pass by his will.* The equitable estate is often the real, beneficial, substantial estate, while the corresponding legal estate is a mere form and shadow.† What is now called "trust" was anciently denominated a "use." The term "use" has been defined as "a mere confidence in a friend to whom the estate was conveyed by the owner, without consideration, to dispose of it upon trusts designated at the time, or to be afterwards appointed by the real owner."‡ The cases reported present a variety of *contests* between the claimants of these often *rival* interests. When they *exist* in harmony, and by *consent*, the principal duty of the court is to enforce the performance of the duty imposed on the "trustee."§

The use was employed to convey both personal and real property, but its principles assumed more importance when applied to real property.

The Ancient Remedies.—Under the Roman law the use or trust went under the name of *fidei commissa*. This *confidence* reposed was of a precarious character, and the beneficiary had no remedy, except to depend upon the honesty and fidelity of the party in whom the confidence was reposed. Under the direction of one of the Roman emperors, Augustus, a separate court was constituted, called by Lord Bacon, "Chancellor for Uses,"—called by the Roman lawyers, *Prætor fidei commissarius*.

This example is given by Kent: "If the testator, in his will, appointed Titus to be his heir, and requested him, as soon as he

* *Gresley v. Mousley*, 4 De G. & J., 78; *Pomeroy's Eq. Jur.*, §§ 975, 989.

† 2 *Pom. Eq. Jur.*, § 975. See ch. "Trusts," vol. ii.

‡ 4 *Kent Com.*, 290.

§ In the case of *constructive* trust there is always *antagonism*; the trust being imposed on the trustee against his will, these are often termed *trust in invitum*. See example given in *Perry's treatise on Trusts*, § 166; 2 *Pom. Eq.*, *supra*.

should enter upon the inheritance, to restore it to Caius, he was bound to do it, in obedience to the trust reposed in him."

And, it is said, the "Emperor Justinian gave greater efficacy to the remedy against the trustee by authorizing the prætor, in cases where the trust could not otherwise be proved, to make the heir or legatee disclose or deny the trust upon oath, and, when the trust appeared, to compel the performance of it."

The Romans did not allow certain persons to hold as heirs or legatees, such as strangers and exiles; and, for many ages, a man was not allowed to dispose of his land by will.

The feudal land system prohibited all devises of real property, for the reason that the heir might have been neglected. The restrictions of the municipal law of Rome and the peculiarities of the feudal tenure of a more recent date gave rise to this mode of conveyance. The English ecclesiastics, no doubt, obtained the idea from the Roman law to avoid the consequences of the statutes of mortmain. These statutes prohibited the holding of lands by religious houses, and the accumulation of vast property to the church.

So, they would make the conveyance to a party capable of holding, and charge the conveyance with a use in favor of the church, which was enforced by the clerical chancellors. "During the disputes between the Houses of York and Lancaster, and during the civil commotions which attended the reigns of Richard II. and Henry IV.," says Mr. Sanders, "almost all of the lands in the kingdom were conveyed to uses. The object was to avoid attainders and forfeitures, and to preserve the property in families according to the wish of the owner." So, it would seem that uses and trusts had their origin in fraud, that is to say, in the attempt to evade long-established laws, and, no doubt, often to defeat creditors.

But, says Mr. Sanders, if "their origin was by fraud, their continuance proceeded from laudable motives." And Mr. Lewin, in his work on *Trusts*, quotes an old counsellor as saying: "The parents of the trust were fraud and fear, and a court of conscience was the nurse."

In consequence of the secret manner in which uses were first declared, and the difficulty of obtaining evidence of the object of the parties and the extent of the beneficial interest by the ordi-

nary proceedings of a court of law, it has been said that John Waltham, who was Bishop of Salisbury and Chancellor to King Richard II., by a strained interpretation of the statutes of West. 2, devised the writ of subpoena, returnable to the Court of Chancery only.*

But this writ of subpoena did not give *complete* relief to the party claiming the benefits of the trust, as the courts of law held that the liability of the feoffee did not extend to the heir; that the cause of action did not survive against the heir. Says Mr. Sanders: "But the great point seems to have been settled in 4th Edw. IV., that *cestui use* could obtain no relief in the courts of common law against his feoffee, but must rely upon the equitable jurisdiction of the Court of Chancery. But, even in this king's reign, the principles of equity were so little understood, that it was determined that the subpoena did not extend to the *heir* of the feoffee, who was in by law, but relief in such cases could only be had by his bill in Parliament."

The origin of uses and trusts being as has been stated, great opposition necessarily sprang up from Parliament and the courts of law. The statute 27 Henry VIII., ch. 10, attempted to destroy the character of the use by converting the *equitable* estate into a *legal* estate, thereby transferring them to the courts of law. This statute, commonly called the "statute of uses," annihilated the intermediate estate of the feoffee, or proposed to do so. So that if a feoffment was made to A. and his heirs, to the use of B. and his heirs, B., the *cestui que use*, became seised of the *legal* estate by force of the statute. The legal estate, as soon as it passed to A., was immediately drawn out of him and transferred to B., and the *use* and the *land* became convertible terms.† The *estate* in the use, when it became the same as an interest in possession under the statute, became liable to all those rules to which common-law estates were liable.

The student will remember at this point the contests between the courts of law and the courts of equity for, perhaps, a period of one hundred years. Lord Coke, while a member of the King's Bench, in the time of James I., had a great dispute with Lord

* 3 Black. Com., 52; Cruise, Real P., vol. i., 396; Sanders, Uses and Trusts, vol. i., 14.

† 4 Kent., 294, authorities cited.

Ellesmere as to the power of a court of chancery. It was a war between common law and equity, and the latter succeeded. Quite a number of writers have condemned Coke for his rigid adherence to the strict and technical rules of the common law in this contest, but it must be remembered that a court of chancery is not *now* what it was *then*. There is palliation for Coke's opposition to the Chancery Court at that period, when it was administered by the courtier lord chancellors, who were the special favorites of the king, who did all they could to support the divine right of kings and the royal prerogative. But the common law was the reverse; it opposed the encroachments of the crown, and tended to the protection of the inalienable rights of the people; but the reasons urged by Lord Coke do not now apply in England, and never did apply in this country. The Chancery Court is at present, whether blended with law or not, a most important jurisdiction for the administration of justice, and is peculiarly suited to the present complicated state of civilization, and in no respect has its wonderful adaptation and efficiency been displayed so fully and satisfactorily as in the administration of *trusts*.

Under the statute of 27 Henry VIII., ch. 10, the following difficulty presented itself:

The courts of law held that the statute "*executed*" only the first use, and that a use upon a use was void; thus, a feoffment to A., to the use of B., to the use of C., the statute was held only to execute the use to B., and the use to C. did not take effect. And in the case of bargain and sale to A. in fee, to the use of B. in fee, the statute passes the estate to A., by executing the use raised by the bargain and sale; but the use to B., being a use in the second degree, is not executed by the statute, and it becomes a mere trust, and one which a court of equity will recognize and enforce.* This strict construction of the law gave a *pretext* for equity to interfere, and it was held that uses in those cases, though void at law, were good in equity, and so uses were revived under the name of *trusts*.

Trusts since the Statute of Uses.—What was called a *use* prior to the statute of uses, is now called a *trust*, being the result

* 4 Kent Com., 302, citing opinion of Lord Hardwicke, in *Hopkins v. Hopkins*, 1 Atk., 591.

of the construction of that statute by the courts of equity and the more complete exercise of their plenary powers. This statute was prompted by Henry VIII., who was displeased with the workings and results of this holding property to uses. But it seems that the unmitigated evil of uses, as portrayed in the preamble to the bill, was not destroyed by this statute at last. Indeed, it accomplished *no real change* in the system of landownership which had become established and sustained by public opinion. The Parliament at that time dared *not openly* to oppose the express will of Henry VIII., but the Parliament showed no disposition to interfere with the *legislative work of chancery*, by which the statute was practically a dead letter.

In fact, the courts of chancery held that the statute did not touch several species of uses then in existence. It was held to apply only to *passive* trusts, and not to *express active* trusts.

So when any control or discretion was given to the feoffee or trustee in the application of rents and profits, or where he was required to do any specific act in regard to the land, the *legal* estate was held by the courts to remain in the feoffee or trustee to enable him to perform the trust reposed.*

Judge Kent further says: "A regular and enlightened system of trusts was gradually formed and established. The ancient use was abolished, with its manifold inconveniences, and a secondary use or trust introduced. Trusts have been modelled and placed on a true foundation since Lord Nottingham succeeded to the great seal, and we have the authority of Lord Mansfield for the assertion, that a rational and uniform system has been raised, and one proper to answer the exigencies of families, and other civil purposes, without any of the mischiefs which the statute intended to avoid."†

The great objection to the ancient *use* was, that it was not subject to the liabilities and incidents of an estate in law, that it was not subject to dower or curtesy, nor to any of the forfeitures to which the owner of the legal title was subjected, and that it tended to great fraud; but, under the modern and more improved ad-

* 2 Pom. Eq. Jur., § 984. and the English authorities there cited; Spence, vol. i., pp. 461-5. See Tudor's Leading Cas.; Chudleigh's Case, 200; Tyell's Case, 251 (the latter subject), "Use upon a Use."

† Vol. iv., 302.

ministration of the doctrine of trusts, they have been made subject to the common-law canons of descent, they are disposable and devisable as legal estates, and subject to the payment of the debts of the beneficiary. And instead of being now an engine of fraud, the enforcement of a trust in our courts of equity is eminently promotive of the ends of justice and a *preventive* of fraud.

I will only add, at this place, what Mr. Spence says of the result of the statute of uses in England: "The object with which the statute of uses was introduced, appears to have been to extinguish uses as distinct from possession or legal ownership, 'to extirpate them by the roots,' and with them the 'mean to transfer lands and tenements without any solemnity or act notorious;' but the construction put upon the act as passed was, that it was not intended that the practice of conveying to uses should be abolished, but only that the estate of the feoffee should be transferred to the person entitled to the use. In fact, the old modes of conveyance were continued, and legal operation was given to them by force of the statute. Thus uses continued to be raised by conveyances operating by transmutation of possession, and operating without transmutation of possession; in the former case by feoffment, by lease and release, by fine and recovery; in the latter by bargain and sale, and by covenants to stand seised; and from the passing of the statute of uses, bargains and sales, and covenants to stand seised, had to be added the list of *legal*, though not common-law, conveyances."*

Mr. Perry, in his treatise on *Trusts*,† says: "Thus interest in land became of three kinds: First, the estate in the land itself, the old *common-law fee*. Second, the *use*, which was originally a creature of equity, but after the statute of uses it drew the estate in the land to itself, so that the fee and the use were joined and made but one legal estate, not differing from the old common law except in the manner of its creation; and, thirdly, the trust, of which the common law takes no notice, but which in a court of equity carried the beneficial interest and profits, and is still a creature of that court as the use was before the statute."

* 1 Spence's Eq., 478; Lord Bacon's Read., 33; Gilbert, 139; Sanders on Uses, 1.

† Perry on Trusts; Lord Hardwicke, in *Willet v. Sanford*, 1 Ves., 186.

Mr. Cruise has said: "A trust is a use not executed by the statute 27 Henry VIII."

For a thorough understanding of the origin of uses, prior to the statute 27 Henry VIII., and the constructions placed upon that statute by the English courts, the student is advised to read Spence's *Equitable Jurisdiction of the Court of Chancery*.^{*} This is a work of great learning, and, as said in the preface, he has "traced the rise, and progress, and the final establishment of the modern equitable jurisdiction of the Court of Chancery, . . . and the principles upon which its jurisdiction was originally founded, and how these principles are applied at the present day." This work was published in 1846.

Different Classification of Trusts.—Mr. Lewin,[†] in his work on trusts, has made the following division :

1. *A Simple Trust.*
2. *The Special Trust.*

"A *simple trust* is where property is vested in one person *upon trust* for another, and the nature of the trust not being prescribed by the settler is left to the construction of law. In this, the *cestui que trust* has *jus habendi*, or the right to be put in actual possession of the property, and *jus disponendi*, or the right to call upon the trustee to execute conveyances of the legal estate as he may direct."

The *special trust* "is where the machinery of a trustee is introduced for the execution of some purpose particularly pointed out, and the trustee is not as before a mere passive depository of the estate, but is called upon to exert himself actively in the execution of the settler's intention, as, where a conveyance is to trustees upon trust to sell land for payment of debts."

Trusts are also of two kinds :

1. *Executed Trust.*
2. *Executory Trust.*

An *executed trust* is where the settler has done all that was

^{*} As special reference to uses and trusts, see vol. i., pp. 446-478; as to trusts, since statute of uses, see vol. i., pp. 478-552.

Mr. Lewin has a book on the "Law of Trusts;" another English author, published in 1875, of much value, Hill on "Trustees," is a work familiar to the profession; and, of course, Sanders on "Uses and Trusts."

[†] Lewin, Law of Trusts, 18, 19.

necessary to make the trust effectual, where no further act is necessary on the part of the trustee to raise and give effect to it, and where there is no ground for the interference of a court of equity to affix a meaning to the words declaratory of the trust, which they do not legally import; as, a conveyance to the use of A. and his heirs, with a simple declaration of trust for B. and his heirs, or the heirs of his body; the trust in this instance is perfect.

An *executory* trust requires an ulterior act to raise and perfect the trust, as in the case of marriage agreements, in contemplation of marriage, and in the case of wills, which are merely of a subsequent conveyance in trust. In the case of *executory* trust, the court of equity is governed by the presumed intentions of the parties, and the rules of construction are more enlarged and liberal than in cases of an *executed* trust, the rules of construction in the latter being very similar to those applied in the case of technical legal estates.*

Then we have *public* and *private* trusts, *ministerial* and *discretionary*; trusts *lawful* and *unlawful*. Trusts *implied* are of frequent occurrence. *Implied* trusts are such that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust.† The terms "*implied*," "*resultant*," "*constructive*," and "*express*," are sometimes indiscriminately used in the cases, which leads to confusion; it is an inaccuracy, as will appear on close examination. Each has a well-defined difference in meaning as regards its creation. Then we have the term *direct* trust, which is but another name for *express* trust.‡

As an original and primary division of all trusts, they may be classified as follows: First. Trusts *declared*. Second. Trusts *not declared*, but raised by deduction, conclusion, or implication of law.

First, a trust *declared*, is where the same is declared by an instrument in writing, or by a parol declaration, in which is pointed

* 4 Kept Com., 305, note 2; Sanders, vol. i., 337; Williams v. Williams, 8 N. Y., 540. Definition of *executed* and *executory* trust, see Leroy v. Griffith et al., 65 N. C., 236.

† Perry on Trusts, § 25.

‡ Perry on Trusts, § 24.

out directly the property, persons, and purposes of the trust: this done at the time of the conveyance or declaration, by a party having a right to create the trust, and in a mode to clearly indicate the intention and meaning of the party executing the instrument, or making the verbal declaration (in States where the oral declaration is admissible). Trusts, not *declared*, comprehend the more numerous and important classes of trusts which are implied, presumed, or construed by law to arise out of the *transactions of the parties*; or from what they have said in instruments from which the court makes an inference of what was *intended*, though not *fully expressed*. These different classes will be illustrated in the progress of this treatise.

As a result of the doctrine of trusts, a substantial and actual estate exists in the land. In reference to the theory, it may be said at this point, these equitable estates derive their origin from the rules and principles which prevail in a court of equity.* Speaking of the latter class of equitable estates, Mr. Lomax† says: "Implied, resulting, or constructive trusts, arise in all these cases where it would be contrary to rules and principles of equity, that he in whom the property becomes invested should hold it otherwise than as trustee. Such trusts can only be in favor of those for whom they might have been declared by the party creating them, and they arise from the manifest intention of the parties or the nature of the transaction, where there is no written evidence of the trust.

"They may be regarded as standing upon the presumed intentions of the parties, or such as are independent of any such intention, and are forced upon the conscience of the party by operation of law, as in case of meditated fraud, imposition, notice of an adverse equity, and other cases of a similar nature. Implied and resulting trusts include such trusts as arise from some party having the beneficial ownership of the property. Constructive trusts include all others not included in the former, and they depend upon the conclusions of law independent of contract, and often arise in cases where there is no intention to create a trust on the part of any of the parties concerned. Generally speaking, they are imposed *involuntum*."

* Washburne Real Prop., vol. ii., 91.

† Lomax's Digest, vol. i., 232.

The same author considers the doctrine of trusts, other than those *declared*, in reference to the following cases, extracted from the great variety of trusts (within this second class as here defined):

1. "Implied trusts arising out of the equitable conversion of land into money or money into land.

2. "Where an estate is purchased in the name of one person, and the consideration is paid by another.

3. "Where a conveyance is made of land without any consideration or declaration of uses.

4. "Where a conveyance is made of land in trust declared as to part, and the conveyance is silent as to the residue.

5. "Where a conveyance of land is made upon such trusts as shall be appointed, and there is a default of appointment.

6. "Where an estate is conveyed on particular trusts which fail to take effect.

7. "Where a purchase is made by a trustee with trust-money.

8. "Where a purchase of real estate is made by partners with partnership funds.

9. "Where a renewal of release is obtained by a trustee or other person standing in a fiduciary relation.

10. "Where purchases are made of outstanding claims upon an estate by trustees, or some of the tenants thereof, connected by privity of estate with others having an interest therein.

11. "Where fraud has been committed in obtaining a conveyance.

12. "Where a purchase has been made of land without a satisfaction of the purchase-money to the vendor.

13. "Where a joint-purchase has been made by several, and payments of the purchase-money to the vendor have been made by some beyond their proportion."*

This accurate and comprehensive division of implied, resultant and constructive trusts by Judge Lomax, seems to cover the entire ground as regards the origination of these trusts.

Out of these varied trusts have grown a very large proportion of the controversies in regard to land during the last century, and no doubt the future history of judicial investigation into land

* Lomax's Digest, vol. i., p. 200.

titles, will disclose an increased prominence in these equitable estates.

While the courts of law, through the action of ejectment, have, under sound and safe rules, been able to decide controversies as to the *legal* title, or the possessory right to land, it has been the peculiar and appropriate province of a court of equity to declare the rights of the parties growing out of these fiduciary and complicated relations. This is the boast of the grand tribunal of *equity*.

Express Trusts—By Parol and by Writing.—In connection with this head we are confronted with the statute of frauds, 29 Car. II., ch. 3, secs. 7, 8, 9. This statute is substantially re-enacted in all the American States,—difference consisting mostly in the retention or omission of the 7th, 8th, and 9th sections of that famous act. The 7th section of this statute provided :

“That all declarations, or creations of trust or confidence of any land, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else shall be void.”

The 8th section of same act exempts from its operation, trusts arising or resulting by implication or construction of law.

The English courts placed quite a subtle but important construction upon this 7th section of the act. The language is, shall be *manifested and proved* by writing; so it was held that a trust might be *created* by parol, but it was sufficient to show the existence of this trust by *written evidence*.*

Mr. Hill, in his treatise on trustees, gives the following illustrations of this construction: “If the trust were considered to derive its existence, *ab initio*, from the written declaration, the trust estate could not form part of the disposable property of the *cestui que trust* previously to the execution of that declaration; and, moreover, up to that time it would be liable for the acts and incumbrances of the ostensible owner. But now the declaration,

* Hill on Trustees, 88; Foster v. Hale, 3 Ves., Jr., 707; Randall v. Morgan, 12 Ves., 74. Same construction in American cases: see 14 Me., 281; 5 Johns. Ch., 1; 7 Gill & J., 157; 16 Mass., 221; 15 Vt., 525; 31 Mo., 75; 12 Pick., 233; Gibson v. Foote, 40 Miss., 788; Reid v. Reid, 12 Rich. Eq., 213; Perry on Trusts, § 79; Spence's Eq. The 9th section required all *assignments or grants* of a trust to be in *writing*.

when made, has relation backwards to the time of the creation of the trust of which it is evidence, and consequently gives effect to all intermediate acts of disposition made by the *cestui que trust*, between the declaration of trust and its actual creation, while it defeats the rights which parties claiming under the trustee might have otherwise acquired. This, however, was subject to the rights of *bona fide* purchasers for valuable consideration without notice. Thus, where a freeman of London purchased real estate in the name of another person, without any trust being expressed at the time, and the freeman died, having devised the estate, and, *after his death*, the trustee declared that he held in trust for the freeman, this declaration was held good, so as to entitle the devisee in opposition to the widow, who claimed the estate by the custom of London. On the same principle, in a case where a lease was granted absolutely to a person, and the grantee afterwards became bankrupt, and, *subsequently* to his bankruptcy, made a declaration that the lease had been granted to him as trustee for another person, it was held by the vice-chancellor, and the decision was affirmed on appeal by Lord Lyndhurst, that the assignees of the bankrupt were not entitled to the lease.”*

And upon this principle it was also held that a settlement in writing after marriage, which recited a parol agreement *before* marriage, was valid against creditors.†

These sections, 7, 8, 9, of the statute of frauds, have been adopted in a majority of the States. In Texas, Tennessee, North Carolina, Virginia, Connecticut, Delaware, Kentucky, Indiana, and Ohio, the 7th section does not seem to appear.‡

Of course, in those States where the 7th section is enacted, *parol* evidence is not admissible to *declare* a trust, the *writing* is re-

* Hill on Trustees, 89.

† Dundas v. Duters, 1 Ves., Jr., 196. The doctrine that a post-nuptial contract is *valid* when founded upon ante-nuptial *parol* contract, seems not sustained by the weight of American authority: Reade v. Livingston, 3 Johns. Ch., 481; 2 Kent's Com., 440-1 (note); Borst v. Corey, 16 Barb., 140; Andrews v. Jones, 10 Ala.; Babcock v. Smith, 22 Pick., 61.

‡ Miller v. Thrasher, 9 Tex., 482; Bank v. Carrington, 7 Leigh, 576; Shelton v. Shelton, 5 Jones Eq. (N. C.), 292; Wilburne v. Spafford, 4 Sneed, 705.

In the case of Wilburne v. Spafford, *supra*, it was held that a title-bond, by which the holder has a mere equitable estate, may be transferred by mere delivery without writing; citing Cox v. Cox, Peck's Rep., 443, 458; 1 Meigs Digest, p. 542.

quired in like manner with that which conveys the legal title. But in Connecticut, where the 7th section is omitted, the case of *Dean v. Dean** decided that an *express* trust could not be established by parol under the general principles of the common law and the statute of frauds.

Taking it for granted, then, that in those States where the 7th section is adopted, that an *express* trust must be made by *writing*, I wish to show that the States not having adopted this section (7), have authority in law for the establishing of an *express* trust in *parol*.

Mr. Perry says it has been a mooted question at common law, whether a use could be raised by parol, but says there seems to be no good reason for the doubt, and maintains the view that a use was declarable in land by *parol*. He says: "As the estate itself could be transferred without writing, it would seem to follow that uses declared at the same time in the presence of witnesses might be effectually established."†

Mr. Sanders says that in the commencement, uses were of a secret nature, and were usually created by a parol declaration.‡ Mr. Lewin takes the same position.§ Lord Chief Baron Gilbert|| used the following language: "At common law a use might have been raised by words upon a conveyance that passed the possession by some solemn act, as feoffment; but where there was no such act then it seems that a deed declaratory of the use was necessary; for as a feoffment might be made at common law by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seised to uses without deed; but a bargain and sale by parol has raised a use without."

* *Dean v. Dean*, 6 Conn., 287. In Ohio, in the case of *Flemming v. Donohoe*, 5 Ohio, 255, it was held that, under the common law, before the statute of frauds, a *parol* trust could be made. But the Act of 1810, in that State, perhaps, excludes the evidence. In *Dean v. Dean*, and *Flemming v. Donohoe*, the opinions were directly the *opposite* as to the right to declare a trust in parol at common law.

† Perry on Trusts, § 75, notes.

‡ 1 Sanders Uses and Trusts, 14, 218.

§ Lewin on Trusts, 41.

|| Gilbert on Uses, 270; 3 Atk., 141; *Fordyce v. Willis*, 2 Bro. Ch., 587; *Benbow v. Townsend*, 1 My. & K., 511. Lord Thurlow was of the same opinion.

It is a little curious, however, that Mr. Spence, in both volumes of his work on the *Equitable Jurisdiction of the Court of Chancery*, has almost entirely *ignored* this question. He speaks of the statute of frauds, mentions the 7th, 8th, and 9th sections, and says under that statute parol is admissible to *declare* a trust in personal property; but omits to discuss the question of such great importance before the passage of the statute of frauds. Mr. Hill says it was a debatable question at common law; so does Judge Story.*

In the United States, however, some of the States, notably, Texas, North Carolina, Tennessee, and Virginia, not having re-enacted the 7th section of the statute of frauds, have held that an *express* trust can be fixed on real property by *parol*, at the time of making the conveyance of the fee. Reference has already been made to these States, and cases stated in the note, but the subject requires a more careful examination.

It may be observed that Pennsylvania, prior to the statute of 1851, held that a parol trust could be made as to lands.†

The late Chief Justice Pearson, of North Carolina, whose legal attainments were of the most thorough character in regard to all questions pertaining to real estate controversy, has gone to the foundation of the doctrine of express trust and parol. In the late case of *Wood v. Cherry*, that eminent lawyer said: "A trust may be created in four ways:

1. "By transmutation of the legal estate, when a simple declaration is sufficient.
2. "Contract, based on a valuable consideration to stand seised to the use or trust for another.
3. "A covenant to stand seised to the use or trust for another upon good consideration.
4. "Where a court by a decree converts a party into a trustee

* Hill on Trustees, 55, and refers to the authorities which sustain the view of Lord Chief Baron Gilbert. See Story, Eq. Jur., § 971.

† *German v. Gabbold*, 3 Binn, 302; *Wetherell v. Hamilton*, 15 Penn. St., 195; *Barnett v. Dougherty*, 32 Penn. St., 134. Kentucky, although not adopting the 7th section, has refused to sustain an express trust by *parol*: *Parker v. Bodley*, 4 Bibb., 102. In Mississippi the 7th section is now adopted: *Anding v. Davis*, 38 Miss., 574.

on the grounds of fraud." The view here expressed is sustained by the cases in that State given in the note.*

Parol Evidence to Establish an Express Trust.—It may be important to bring forward more prominently the cases in which parol evidence is admissible in showing an *interest in lands*. We have just shown that at common law land might be charged with a *parol trust*, and that to retrench this doctrine, the seventh section of the statute of 29 Car. II., ch. 3, provided that all declarations of trust or creation of confidence in lands or tenements shall be "manifested and proved by some writing," etc. But as this section is omitted in several of the States where the statute of 29 Car. II. has been enacted, we will give some instances which will illustrate the common-law doctrine in the United States, where not controlled by the statute of frauds.

Allusion has been made to *Shelton v. Shelton*. The facts were as follows: Mrs. Morgan, wishing to provide a home for her daughter, Mrs. Shelton, and her children (the son-in-law having failed and sold out), purchased a tract of land and had the deed made to Vincent Shelton, who was the only son of Mrs. Shelton then of full age, with a *verbal* declaration of trust, that he was to hold for his mother during her life, and then remainder in fee to all her children. Mrs. Shelton and family lived on the land for many years without paying rent, and without any claim being set up by Vincent, the person holding the legal title.

Pearson, C. J., delivered the opinion, holding that, as in North Carolina the seventh section of the English statute of frauds had not been re-enacted, the doctrine of the common law prevailed, and that parol evidence was competent:

1. To repel the implication of a trust in favor of Mrs. Morgan, from whom the consideration moved.
2. To establish the rights of the parties in accordance to the verbal declaration of the trust by Mrs. Morgan at the time she had the deed made.

* *Wood v. Cherry et al.*, 73 N. C., 115; *Shelton v. Shelton*, 5 Jones Eq., 292; *Hargrave v. King*, 5 Ire. Eq., 430; *Cloninger v. Summit*, 2 Jones Eq., 513; *Hass v. Ferguson*, 64 N. C., 772; *Henderson v. McBee*, 79 N. C., 219; *Tankord v. Tankord*, 84 N. C., 286; *Mulholland v. York*, 82 N. C., 510; *Shields v. Whitaker*, Ib., 516; *Gidney v. Moore*, 86 N. C., 484; *Young v. Dula*, 70 N. C.; *Riggs v. Swann*, 6 Jones Eq., 118.

Then, in *Hargrave v. King*,* it was held that, if one agrees by parol to buy land for another, and does buy the land and pay for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement; that the same was not within the statute of frauds as enacted in that State. The same doctrine is announced in *Cloninger v. Summit*.† Then, in *Ferguson v. Hass*,‡ the question was elaborately argued, and the same doctrine sustained, Rodman delivering the opinion; Pearson, C. J., who delivered the opinion in *Shelton v. Shelton*, being still on the bench. The facts were these: Allen Ferguson was seised of a tract of land; John, his brother, and one Langston, his brother-in-law, had obtained judgments against him, and executions had been levied on the land. Allen was then in prison, and it was agreed between him and John that Allen should convey the land to John, who should also buy it in at the execution sale, and hold one-half of it in satisfaction of the execution debts, and the other half in trust for Allen in fee. In pursuance of this agreement Allen, on September 8th, 1858, made an absolute deed in fee for the land to John.

Shortly afterwards, John bid off the land at execution sale for \$1300, it being worth \$2500 or \$3000, and took a deed from the sheriff to himself. Allen and John cultivated the land together, and divided the crops and also the rents equally. John, during his life, frequently admitted verbally that Allen owned half the land, and both John and Allen treated it as their common property. John died, and his administrator filed a petition to sell the land as his property to pay his debts. The widow and heirs of Allen Ferguson filed a bill praying that the heirs of John be declared trustees for them as to one-half of the land. And such was the decree of the court below, and affirmed in the court of last resort.

Mr. Folk, who argued against the view adopted by the court, attempted to show that the statute,§ which provided that all contracts to sell or convey land, or any interest in them, shall be in writing, included this case, although trusts were not mentioned

* *Hargrave v. King*, 5 Ire. Eq., 430.

† *Cloninger v. Summit*, 2 Jones Eq., 513.

‡ *Ferguson v. Hass*, 64 N. C., 772.

§ Revised Code, ch. 50, sec. 11.

in the statute. He drew an argument from the doctrine that a legal and equitable estate are subject to the same canons of descent; that they are liable to the same laws against perpetuity, legal charges, devolution, and transfer; that a devise of a trust must be with the same ceremony as a devise of the legal estate; that a jointure of a trust is as good as one of a legal estate to bar dower, etc. And the argument was made that, "if a trust in land may be raised by parol, it may be transferred by parol, and thus the good intention of the statute, by a small evasion, is taken away, and evils, boundless in their range and pernicious in their consequences, introduced." It was further contended that the case of *Shelton v. Shelton* was an innovation, and not sustained by authority. The court say: "We think the counsel misapprehended the case of *Shelton v. Shelton*, and also the case of the present plaintiffs. The case in *Shelton v. Shelton* was in substance this: Mrs. Morgan purchased a piece of land, and caused the deed to be made to her grandson, Vincent Shelton. By a principle of common application in the English, as well as in our law, in the absence of any proof to the contrary, a presumptive trust would have arisen in favor of Mrs. Morgan; and, after her death, her heirs filed the bill to enforce such a trust against the defendants, who were the mother of Vincent Shelton and her children. *To repel this presumption*, and substitute a different trust from the one which the law presumed, the defendants proved oral declarations and acts by Mrs. Morgan tending to establish a trust for them; and, among other things, a possession by them for many years during her life. Whether or not mere oral declarations by a holder of the legal estate are sufficient to create a trust for the benefit of a stranger, it is clear that no such point was decided in *Shelton v. Shelton*."

The court might have added that the facts showed that Vincent Shelton (in whom was the legal title) had not only made oral declarations, but never had claimed rent, and had recognized the trust for years. So that, to charge the legal owner with the trust in this case was not confined to simple oral declarations.

So in this case, we have not only the declarations repeated by John Ferguson, while in possession, that one-half of the land belonged to Allen; but we have his *acts*, such as both living on

the land for years and dividing the rents equally; to this is added the gross inadequacy of consideration. The court, therefore, say: "The acts, dealings, and declarations of the parties become competent to ascertain the nature and limits of the trust which is attached to the legal estate. This is so wherever a trust is presumed by construction of law; and it would seem to be only saying the same thing in another form to say that it is so in every case where there is a transmutation of the possession by deed; and by any means, other than the declaration of an express trust in writing, the trust becomes disjointed from the legal estate."

On a careful reflection, the reasons for admitting parol evidence are obvious. The feoffment, with the ceremony of livery of seisin, was the actual transfer of the possession; property of this kind was only recognized by courts of law when in the possession of the claimant, and any contract, as bargain and sale, for instance, conveyed no title. This mode of conveyance was not recognized by the common law; it was only enforced in the courts of equity on the grounds of the consideration, the vendor being held as a trustee for the vendee who had paid the purchase-money. The feoffment was made by parol, then why could not the use or trust be created in parol? Now, under the statute of uses, the deed of bargain and sale, when enrolled in England, and registered in this country, has the *legal* effect of the feoffment to transfer the possession to the vendee or bargainee. In other words, the bargainee, before the statute of uses, only had a trust or use; now, since that statute, and by virtue thereof, this use, trust, or equitable estate is a *legal* estate. Such is the effect of all of our State statutes, which have, in effect, re-enacted the statute of uses, or recognized the same as a part of the law of the land accepted by the colonists.

This parol evidence is not in conflict with the feoffment or deed. As said by Pearson, C. J., in *Shelton v. Shelton*, *supra*, the declaration of the trust did not change the deed; the legal title passed by operation of the deed, but the *effect* of the declaration in parol (as would have been if in writing) was to fix upon the holder of the legal title a charge or trust in favor of a third party. So the *law* has its effect in the deed, while *equity* is satisfied by the *trust*. The property is liable to *two estates*, legal and equitable. There is no contradiction and no want of harmony.

Reference is made in the note* to the decisions of the other States where the parol declaration is valid.

As regards the ancient mode of the verbal transfer of land¹, Sir Edward Coke gives a scriptural illustration: "When the kinsmen of Elimelech gave unto Boaz the parcel of land that was Elimelech's, he took off his shoes and gave them unto Boaz in the name of seisin of the land (after the manner of Israel), in the presence and with the testimony of many witnesses; and that when Ephron enfeoffed Abraham of the field of Machpelah, he said to him, I deliver this field to thee."

How Express Trusts are Created.—In the last pages an attempt has been made to show that in a portion of the States this *express* trust is created in parol, and of course, where this is admitted (as in case of written trust), the question of intention is often involved; to show which, the circumstances are all considered,—the declaration of the grantor, the trustee, admission and acts, treatment of the property, consideration, and the numerous instances of *conduct*, operating as estoppel *in pais*, are all considered.

But as the law of most of the States requires that this declaration shall be in writing (7th section of statute of frauds), the greater number of the profession are interested in this latter view of the question.

Then, in response to the head of this subject, it must be said that, under the statute of frauds, especially the seventh section thereof, the *express* trust must be declared in *writing*. No particular words need be used in this *writing*; even the words "trust" or "trustee" need not be used, but any other words which show unequivocally the intention that the legal estate was vested in one person, but to be held in some respect for the benefit of *another*.†

The written evidence to satisfy this statute (7th section) *may*

* Haywood v. Ensley, 8 Hump., 460; Sanders v. Harris, 1 Head., 207; 1 Meigs Digest, p. 606; Bank of U. S. v. Carrington, 7 Leigh, 566.

† 2 Pom. Eq. Jur., § 1009. The 7th section of the statute of frauds provides "all declarations or creations of trust or confidences in lands, tenements, or hereditaments, shall be *manifested or proved* by some writing signed by the party who is by law enabled to declare the trust, or by his last will in writing, or else they shall be utterly void." The trust, then, must be made in accordance with this section in all those States in which this section is not omitted in the statute adopted by the State.

come from the grantor or from the trustee, the grantee to whom the land is conveyed for the purpose of the trust, but not from the *cestui que trust*. The grantor may declare the trust in a will or deed, or in an instrument separate and distinct from the conveyance. Or the owner of an estate may declare himself a trustee, and that he holds the land in trust for another, without conveying the legal title.* While the grantor may declare a trust in a separate instrument accompanying the deed, a testator who devises land cannot declare a trust in a valid manner by means of a separate paper writing, which is not duly executed with the formalities required for the execution of a will, even though the writing be referred to in the will.†

"Where the trust is not created in and by the instrument of conveyance, it may be sufficiently declared and evidenced by the trustee to whom the land is conveyed, or who becomes the holder of the legal title; and this may be done by a writing executed simultaneously with or subsequently to the conveyance, and such writing may be of the most informal nature."‡

"The trustee's acceptance of the trust may be express by his executing the conveyance or other instrument, or by assenting to the will, or it may be inferred from his dealing with the property, and, *prima facie*, he is presumed to accept. An acceptance of the trust is necessary to bind him, but not in order to validate the trust. A court of equity never suffers an express trust to fail from want of a trustee."§ Where there has been no other writing, the admission by a party defendant in chancery may be a sufficient declaration of a trust.||

This question has recently been accurately stated in New York

* *Patton v. Beecher*, 62 Ala., 579; *Urann v. Coates*, 109 Mass., 581.

† *Homer v. Homer*, 107 Mass., 82; *Lynch v. Clements*, 24 N. J. Eq., 431.

‡ *Smith v. Mathews*, 3 De G. F. & S., 346; *Forster v. Hale*, 3 Ves., 696; *Union Mutual Ins. Co. v. Campbell*, 95 Ill., 267; *Bates v. Hurd*, 65 Me., 180; *De Laurence v. De Boom*, 48 Cal., 581; *Tanner v. Skinner*, 11 Bush., 120; *Moore v. Pickett*, 62 Ill., 158; *Johnson v. Delaney*, 35 Texas, 42; *Phelps v. Seely*, 22 Gratt., 573; *Baldwin v. Humphrey*, 44 N. Y., 609; *Packard v. Putnam*, 57 N. H., 43; *Ivory v. Burns*, 56 Penn. St., 300; 2 Pom. Eq. Jur., § 1007 (notes).

§ 2 Pom. Eq. Jur., § 1007 (notes).

|| 44 Mich., 5; 7 Gill & J., 157; 27 Ohio St., 553.

by the Court of Appeals,* in which it is said that "all the cases agree that the trust need not be stated in the very words of the statute,† but is sufficient, if a purpose within the statute is clearly embraced in the language used, for the execution of which the trustee may be clothed with the legal title."‡

Express Active Trust.—An *express active* trust, when not restricted by statute, may, as a general rule, be created for every purpose not unlawful, and may extend to both real and personal property.

In this class, the interest of the trustee is not a mere naked legal title, and that of the *cestui que trust* is not the real ownership of the subject-matter. The trustee's estate and power over the subject-matter are commensurate with the duties which the trust devolves upon him. The trustee is generally entitled to the possession and management of the property; he may receive rents and profits, and, if from the trust he has power to do so, he can sell. The beneficiary always has the right to compel a performance of the trust.§

Trusts once *active* may become *passive*, and then it may be, in many instances, that the legal estate may pass and vest in the "beneficiary," and entitle him to a conveyance from the trustee of

* *Donovan v. Van De Mark*, 78 N. Y., 244, citing *Leggett v. Perkins*, 2 N. Y., 297; *Vernon v. Vernon*, 53 N. Y., 351; *Hermans v. Robertson*, 64 N. Y., 332; *Martin v. Funk*, 75 N. Y., 134.

† It should be observed that in New York all trusts are abolished except as fixed by the act. But the law of that State provides for an *express* trust in the following cases:

1. To sell lands for the benefit of creditors.
2. To sell, mortgage, or lease lands for the benefit of legatees, or for the purpose of satisfying any charge thereon.
3. To receive the rents and profits of land, and apply them to the use of any person during the life of such person, or for any shorter term, subject to the rules concerning the suspension of the power of alienation.
4. To receive rents and profits of lands, and to accumulate the same for the benefit of minors, for and during their minority. In all these express trusts the whole estate is vested in the trustee; the beneficiary takes no estate in the land, but only the right to enforce a performance by the trustee: 1 R. S. of N. Y., pt. 2, tit. 2, ch. 1, art. 2, § 45.

‡ See *post*, Chancellor Kent's pointed criticism of this attempt to confine the doctrine of trusts within the narrow rules fixed by a legislature.

§ *Spence*, vol. i., pp. 496, 497; *Williams's Appeal*, 83 Pa. St., 377; *Pomeroy Eq. Jur.*, § 986 (note), § 992.

the legal title.* After a great lapse of time, and continued possession by the beneficiary, a legal conveyance from the trustee will be presumed.†

Among the most important instances of *active express* trusts, may be mentioned assignments by a debtor upon trust to pay debts, and including assignees in bankruptcy, insolvency, and all administrators and executors may be included, perhaps; also, a devise of real estate by will upon trust to sell, mortgage or lease to pay debts or legacies, or annuities, or other charges. Trustees in the ordinary trust deed are likewise subject to the law of an express active trust.

These *deeds of trust* to secure debt have become quite common in most of the States. The trustee designated in these deeds is intended to be an impartial agent of both debtor and creditor, and to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment.‡ One great advantage in the *trust deed* is, no decree of court is needed to foreclose. But some of the States require a foreclosure by decree of court, and of course this leaves it without advantage over the formal mortgage, without power of sale. There can be but slight difference, if any, between a deed of trust and a mortgage with power of sale.§

The duties of a trustee in deed of trust require the utmost good faith in his conduct toward both debtor and creditor. He is liable to suit for damages in failing to use reasonable diligence or an abuse of discretionary powers.|| A sale may be enjoined or set aside, at the instance of the injured party.¶

* Perry on Trusts, § 351; *Sherman v. Dodge*, 28 Vt., 26, 30; *Leonard's Lessee v. Diamond*, 31 Md., 536, 541.

† *Leonard's Lessee v. Diamond*, *supra*; *Den v. Bordine*, Spencer (N. J.), 394; *Aiken v. Smith*, 1 Sneed, 304. If all the beneficiaries are in existence and *sui juris* and consent, the court may decree a conveyance of the trust property to them, although the trust has not been completed or closed: *Perry on Trusts*, § 274; *Smith v. Harrington*, 4 Allen, 566. But *contra* in New York by virtue of the statute: *Douglass v. Cruger*, 80 N. Y., 15.

‡ *Taylor v. Stearns*, 18 Gratt (Va.), 244.

§ *Woodruff v. Robb*, 19 Ohio, 212; *Sargent v. Howe*, 21 Ill., 148; *Newman v. Samuels*, 17 Iowa, 528; *Lenox v. Reed*, 12 Kan., 223; *Webb v. Hoselton*, 4 Neb., 308; *Wright v. Brady*, 11 Ind., 398; *Bennett v. Union Bank*, 5 Hump. (Tenn.), 612; *Turner v. Walkins*, 31 Ark., 429. But *contra*: *Koch v. Briggs*, 14 Cal., 256; *Grant v. Burr*, 54 Cal., 298. See also *Wilkins v. Wright*, 6 McLean, 340; 45 Md., 396.

|| *Sherwood v. Saxton*, 63 Mo., 78; *Ballinger v. Bourland*, 87 Ill., 513.

¶ *Terry v. Fitzgerald*, 32 Gratt, 843; *Cassidy v. Cook*, 99 Ill., 385, 389.

Innocent and remote purchasers without notice will generally be protected against such irregularities as over-statement of the amount of indebtedness, and others.* Only parties or a person interested can complain of irregularities in the execution of the trust.†

It is not necessary that the person who is to execute the power in a trust deed should join in the deed, or execute any formal writing, showing his acceptance of the trust.‡ Neither is it necessary that the beneficiary should signify his assent in any formal writing, for his assent is presumed, since it is for his benefit.§

Where a trustee has accepted the trust, he cannot renounce it, without the consent of the beneficiary, or of a court of equity, and he may be compelled to discharge the trust.||

Express Passive Trust.—The difference between this and *active* trust, such as mentioned on the previous pages, is obvious. In these cases, says an author, "The naked legal title alone is vested in the trustee, while the equitable estate of the *cestui que trust* is, to all intents, the beneficial ownership, entitling him to the possession, the rents and profits, and the management and control according to the extent of his estate. These *passive* trusts are considered, in equity, as virtually equivalent to the corresponding legal ownership; the trust is regarded rather as fastened upon the *estate* than upon the *person* of the trustee; it is never suffered to fail for want of a trustee, either when the designated trustee dies, or refuses to act, or is an improper person. These express passive trusts are not very frequent in this country."¶

Voluntary Trust.—The court of equity will not render aid in executing a purely voluntary trust. In other words, there is no equity to perfect an imperfect gift. The *promise* to create a trust without a valuable consideration will not be enforced.

* *Fairman v. Pick*, 87 Ill., 156; *Gunnell v. Cockerill*, 84 Ill., 319.

† *Wade v. Thompson*, 52 Miss., 367.

‡ *Leffler v. Armstrong*, 4 Iowa, 482; *Crocker v. Lowenthal*, 83 Ill., 579.

§ *Shearer v. Loftin*, 26 Ala., 703; 2 *Pomeroy*, Eq. Juris., § 995.

|| *Drane v. Gunter*, 19 Ala., 731; *Sargent v. Howe*, 21 Ill., 148; 2 *Pomeroy*, Eq. Jur., § 995.

¶ 2 *Pom. Eq. Jur.*, § 988; authorities cited.

But it is well settled that an *executed* contract, or a perfect and completed trust, is valid and enforceable, although voluntary.

Then, in order to render the voluntary trust valid and effectual, the party creating it, either by direct transfer or by declaration, must have done everything which, according to the nature of the property comprised in it, was necessary to be done in order to transfer the property, and render the transaction binding upon him. A party *sui juris*, acting freely, has the power to make a voluntary gift of the whole or any part of his property, but a mere intention, whether expressed or not, is not sufficient, and a voluntary promise to make a gift is *nudum pactum*. The gift must be consummated, and not remain incomplete, or rest in mere intention. If the trust has been perfectly created, nothing remains for the court to do but to enforce it. The authorities are so numerous on this point that only a few leading cases will be referred to in the note,* in which the principles and reasons of the rule have been discussed fully.

Some of the authorities have attempted to show that an exception to this rule existed in favor of the wife or child, on the ground that the moral obligation to provide for them created a meritorious consideration for the gift. But in the case of *Young v. Young*, *supra*, where the case was elaborately discussed by the court, they say this doctrine is entirely overthrown, and Judge Story† is quoted to sustain the position.

Legislation on the Subject of Trusts.—It seems that New York intended the statute to be more mandatory and thorough than the statute of uses. The States of Michigan, Wisconsin, Min-

* *Milroy v. Lord*, 4 De G., F. & J., 264; *Richards v. Delbridge*, L. R., 18 Eq., 11, 13; *Kekewich v. Manning*, 1 De G., M. & G., 176. The question is fully discussed in a very late case in New York, *Young v. Young*, 80 N. Y., 422, 436; *Martin v. Funk*, 75 N. Y., 134; *Estate of Webb*, 40 Cal., 541; *Stone v. Hackett*, 12 Gray, 227; *Bond v. Bunting*, 78 Penn. St., 210; 1 Equity Leading Cases, 382, 389; *Neves v. Scott*, 9 How. (U. S.), 196; *Adams v. Adams*, 21 Wall. (U. S.), 185; *Blanchard v. Sheldon*, 43 Vt., 512; *Davis v. Ney*, 125 Mass., 590; *Ray v. Simmons*, 11 R. I., 266; *Minor v. Rogers*, 40 Conn., 512; *Trow v. Shannon*, 78 N. Y., 446; *Owens v. Owens*, 23 N. J. Eq., 60; *Dunbar v. Woodcock*, 10 Leigh, 628; *McNulty v. Cooper*, 3 Gill & J., 214; *Tolor v. Tolor*, 1 Dev. Eq., 460; *Dawson v. Dawson*, *Ibid.*, 93, 400; 23 Ala., 219; 46 Iowa, 162; 52 Ind., 393; *Taylor v. Henry*, 48 Md., 550.

† *Story Eq. Jur.*, §§ 433, 987.

nesota, California, and the Territory of Dakota, have followed New York very nearly.*

As has been stated, New York by statute authorizes four classes of *express* trusts. The effect of these statutes was the abolishment of all *express* trusts, and totally changing the ordinary equitable results of the *resultant* trust, and the substitution of a limited number of classes of trust, and the confinement of their application to specially designated objects. See note on previous page for an epitome of the New York statute on this subject.†

The attempt of the New York legislature to limit trusts to four classes, and throw certain restrictions around the doctrine of trusts, has not proven entirely satisfactory. The revisers intended, as they stated, to relieve *real property* to a great extent from its abstruseness and uncertainties, and to better secure creditors and purchasers, and at the same time to simplify alienations. But, on a full discussion of the subject, Chancellor Kent, in his *Commentaries*,‡ uses the following forcible language: "It is very doubtful whether the abolition of uses, and the reduction of all authorized trusts to those specially mentioned, will ever be productive of such marvellous results. The apprehension is, that the boundaries prescribed will prove too restricted for the future exigencies of society, and bar the jurisdiction of equity over many cases of trusts which ought to be protected and enforced, but which do not come within the enumerated list, nor belong strictly to the class of resulting trusts. The attempt to bring all trusts within the narrowest compass strikes me as one of the most questionable undertakings in the whole business of revision. It must be extremely difficult to define with precision, within a few brief lines and limits, the broad field of trusts of which equity ought to have cognizance."

"The English system of trusts is a rational and just code, adapted to the improvements, and wealth and wants of the nation, and it has been gradually reared and perfected by the sage reflections of a succession of eminent men.

"Nor can the law be effectually relieved from its 'abstruseness and uncertainty' so long as it leaves undefiled and untouched

* See 2 Pomeroy Eq. Jur., § 1003 (note), where the statute in regard to trusts in the States mentioned are given.

† *Ante*, p. 494 (note).

‡ 4 Kent's Com., 312.

that mysterious class of trusts 'arising or resulting by implication of law.' Those trusts depend entirely on judicial construction; and the law on this branch of trust is left as uncertain and as debatable as ever.

"Implied trusts are liable to be extended and pressed indefinitely, in cases where there may be no other way to recognize and enforce the obligations which justice imperiously demands."

Notwithstanding this effort to simplify and limit the doctrine of trusts, the courts of that State do judicially construe the law in harmony with elementary principles of equity, recognized by the most eminent jurists as safe and indispensable.*

The State of Massachusetts has not followed the New York code in regard to innovations on the doctrine of trusts. They adopt 29 Car. II., ch. 3, secs. 7, 8, and provide that no trust, whether express or implied, shall defeat the title of *bona fide* purchasers for value and without notice of the trust, nor shall a creditor without notice be prevented from attaching the property.

It is believed that much of the earlier, and perhaps hasty and inconsiderate legislation, having the effect to limit the power of the court of equity in regard to this great doctrine of *trust*, was for the want of a more thorough knowledge of the equitable and beneficial jurisdiction of a court of chancery. By legislators with crude ideas, led on by some pet idea of reform, backed up by those judges who clung tenaciously to the positive dogmatic rules of the *lex scripta* and the common law, legislative codes have been piled upon the library rooms of the country until the bulk thereof has become a grievance, not to speak of the never-ceasing accumulation of the reports of inferior, middle and highest appeal courts, filled with unnumbered adjudications of the *judicial construction* upon these statutes.

But there is some reason for this ignorance in our legislators, especially of an early period in the history of the United States. Judge Story says there was no equitable jurisprudence in any State prior to the Revolution, or at least a very imperfect and irregular administration.†

The development in the vast chancery jurisdiction has been of slow growth in this country, and mostly in the present century.

* *Downing v. Marshall*, 23 N. Y., 366; *Lang v. Rope*, 5 Sandf., 374.

† *Story Eq. Jur.*, § 56; 3 Tuck. Black, App., 7.

The law of most of the States has conferred powers on the courts of the several States very similar to the jurisdiction of the lord chancellor in the High Court of Chancery in England. Mr. Pomeroy, in the introductory chapters of his valuable work on *Equity Jurisprudence*, has expressed the fear of a tendency of the code systems to ignore altogether the efficient and most desirable principles of equity. I am inclined to think that the danger suggested is more apparent than real. It is true the code system has a tendency to impress the younger members of the profession, who have not been trained in the old procedure, with the idea that "equity is abolished," and that all we have now, is *law*, and that made very *simple*. But age and experience will soon convince the profession that a greater need exists *now* than ever before, for the study of the great doctrines of a court of equity.

Experience will teach that the development and progress of the world, its complications of commerce and business, the tendency of the age to fraudulent machinations, to make money, the increased necessity, growing out of war and financial panics, for the protection of infants, married women and others, create a paramount necessity for the application of the great principles administered in a court of equity. No mere statutory enactment, in the shape of a code, can supersede these principles. For as the courts of England found a way to practically abrogate the statute of uses, because of its ill-adaptation to the necessities of the nation, so our great lawyers and judges will, in time, emulate Lord Mansfield (who was a common-law judge, and lived at a time when it was taken as evidence of a want of knowledge of the common law to draw reasons from the Roman jurisprudence), and give life and new direction to American law, by means of equitable principles in combination with those of that strictly American common law,—this did the great judge, Lord Mansfield, for the English common law. The English kings, often struggling with the Pope, the judges of England were induced to ignore everything having its origin in Rome. It is from the Roman equity jurisprudence, as administered and adopted by the policy of the Roman prætors, that England, and the balance of the world, have drawn the great foundation elements of equity law. From this vast storehouse

of knowledge, Lord Mansfield delighted to draw, as has been done by many able English judges, and the courts of this country within the present century.

I am inclined to the opinion that the code procedure system will ultimately lead to a more complete development of the equity jurisprudence, and, consequently, of a more universal application of the remedies and principles heretofore exclusively administered in a court created for that purpose.

The abolition of the "forms of pleading," the destruction of the difference between "trespass" and "case," whether a suit be called "ejectment" or an "action to recover land," the substitution of a "complaint" for a "bill in equity," and the "declaration," does not necessarily change a single principle of abstract general elementary law. It may of course go further, and say, as some States have done, that no such thing as a resultant trust shall exist—that such instances shall be treated as *void* between the parties. Thus, in New York, where a grant for a valuable consideration shall be made to one person, and that consideration paid by another, no use or trust shall result in favor of the person by whom such payment shall be made.*

But the 52d section of the same act makes it *prima facie* fraudulent as to creditors, and where a fraudulent intent is not disproved, a trust shall *result* in favor of the creditors of the party paying the consideration. Now this act does not destroy the equitable doctrine of "resultant trust," but, instead, actually recognizes the same, and qualifies its application, in making the trust to inure in favor of the creditors of the party rather than the party himself. This is a question of policy, and such a statute no doubt has merit and reason to sustain it. This law has the advantage in this, instead of "destroying" or "limiting" the equity jurisdiction, it partakes more of an "enlargement" of the principles of resultant trust.

The civilized world, no doubt, has shown a tendency to "abolish" "legal forms" of "pleading." Within the last eight years England itself has adopted the most sweeping reform known to modern times, perhaps, in regard to "jurisdiction" and "pro-

* § 51 of R. S., pt. 2, ch. 1, Art. 6, vol. ii., p. 1105 (ed. of 1875).

cedure.”* It is called the “Supreme Court of Judicature Act,” by which all the courts of superior jurisdiction are abolished and substituted by one “Supreme Court of Judicature.” The distinction between actions being abolished very much like in the American codes.

But this English statute, in abolishing the old Chancery Court, does not pretend to limit or abolish equity jurisprudence. For the 24th and 25th sections of this Act of 36 and 37 Vic., provide, “In every civil cause or matter, law and equity shall be concurrently administered.” And also it is provided, “Generally in all matters in which there is any conflict or variance between the rules of equity and the rules of common law, with reference to the same matter, the rules of equity shall prevail.”

This seems to give the decided preference in favor of the continued expansion and enlargement of the already grand system of equitable jurisprudence of that country.

As to our American codes in this regard, Mr. Pomeroy seems to regret that such a provision is not attached to our “Procedure Acts.” *Without* this provision, in the absence of a prohibition in the code, such a result will follow. Pearson, C. J., of North Carolina, in the case of *Lea v. Pierce and wife*,† held that the new code preserves “both systems;” that the provision in the Constitution of 1868, and the laws passed in pursuance thereof, by which the distinction between suits at law and in equity is abolished, leaves the principles of law and equity in full tact. Courts as now constituted give relief in *law* and *equity*. Both systems are preserved. He then gives an illustration: In the old system, if a deed was shown to have fraud in the *factum*, that it was obtained in fear of death or great bodily harm, a court of law would say it was no deed; but a court of equity goes beyond where a court of law stops, and considers that the deed may have been obtained through fraud; and a bond may be declared void, or the holder of the legal title may be declared a trustee for the party defrauded.‡ Even Connec-

* 36 and 37 Vic., ch. 66. The Court of Equity having existed as a separate tribunal for so many centuries in England, has at last disappeared in Great Britain. Such is the result already in most of the American States.

† *Lea v. Pierce and wife*, 68 N. C., 76.

‡ One instance of *expressly* preserving the old procedure, appears in § 34, sub-sec. 9, of the code of North Carolina, in which actions are barred only from

ticut, where, fifty years ago, the case of *Dean v. Dean** was decided (a great hardship, in which the court repudiated the doctrine of a parol express trust in land at common law, and badly mixed up the idea of *express* trust with *resultant* trust), in 1879 adopted a new code of procedure, with the provision, "that wherever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail." This is the same in effect as the provision just mentioned in the English "Judicature Act."

This would indicate that, while in Connecticut, fifty years ago (as in other States), the principles of the doctrine of trust, being administered alone in a court of equity, were not so well understood, owing to the *adherence* to favorite obstinate and rigid inflexible rules of the common law, brought with the colonists, a more broad and liberal view will ultimately be taken of this great system of equity law, which is destined to flourish and fasten on our great country of law and progress, utterly regardless of code procedure or rash *law-reform* legislation.

Trusts Arising by Operation of Law—Resultant and Constructive Trusts.—It has been observed that all trusts were arranged into two grand divisions, *express*, and those by the *operation of law*. The preceding portion of this chapter has treated of *express* trusts, and it is all-important to the young lawyer especially, to understand the difference in these different classes and various kinds of trusts, for from the want of this knowledge much confusion results. Now, it has been seen that an *express* trust in regard to land (except in the States mentioned) must be in *writing*; that the seventh section of the statute of frauds is applicable and governs the same. But the great class of trusts of which I now propose to speak—that is, trusts which arise by operation of law, resulting and constructive trusts—are in express terms excepted from the English statute of frauds, and in all the American States perhaps.† Such trusts need

the time of the discovery of the fraud, and applies only to those cases of an equitable cognizance under the old practice.

* *Dean v. Dean*, 6 Conn., 287; see reference to this case, *ante*, p. 17, note 11.

† See Statute of Frauds; 2 Pomeroy, Eq. Jur., §§ 1008, 1030; *Ward v. Armstrong*, 84 Ill., 151; *Shelton v. Shelton*, 5 Jones, Eq. (N. C.), 292; *Hass v. Ferguson*, 64 N. C., 772.

not be "declared" nor "evidenced" by any writing, but may be established entirely by parol evidence. *Trusts* is a subject of such vast extent, embracing such a multitude of detail, as to require a volume itself. I can only glance at this interesting subject, and keep within the limits intended for this chapter.

The learned exposition of the origin of these various kinds of trusts originating by operation of law, by Judge Lomax, has already been given in this chapter. For an interesting and scientific arrangement, and the details and illustration of this class of trusts, attention is called to the second volume of Pomeroy's *Equity Jurisprudence*.* I do this because it is a late work, and the text is illustrated with the latest cases from all the States, and Mr. Pomeroy writes as though he was thoroughly imbued with the great law of equity. I, therefore, give him credit for much assistance.

Trusts arise by operation of law from deeds, wills, contracts, acts, or conduct of the parties, either with or without intention, but without any express words of creation. Says Mr. Pomeroy, on this point: "A broad distinction separates all ~~express~~ trusts from those which arise by *operation of law*. In the former class, the trust relation is rightful and permanent. In the latter, there is no such element of right and permanency. Even if the trust relation is not wholly wrongful, resulting from fraud or other unconscientious act, still a certain antagonism between the *cestui que trust* and the trustee is involved in the very existence of the trust, and instead of the idea of permanence, the substantial right of the beneficiary is that the trust should be ended by a conveyance of the legal title to himself. All trusts by operation of law, therefore, consist in a separation of the legal and the equitable estate, one person holding the legal title for the benefit of the equitable owner, who is regarded in equity as the *real* owner, and who is entitled to be clothed with the legal title by conveyance."† Certain instances of this class are trusts only *sub modo*; they are termed trusts, because the beneficial owner is entitled to the same remedies against the holder of the legal estate. This is shown by the fact that no resultant or constructive

* 2 Pomeroy Eq. Jur., §§ 1030 to 1058.

† Pomeroy Eq., vol. ii., § 1030; vol. i., § 148.

trust, growing out of the relation of the parties, or the use of funds, will be enforced against the holder of the legal title, who is clothed with an equal equity, even in favor of an infant.*

First. Resulting Trusts.—In all cases of resulting trusts *intention* is an essential element, although never expressed by any words of direct creation. There must be a *transfer*, and under circumstances suitable to raise the trust, the law infers the *intention* that the transferee was not to receive and hold the legal title as beneficial owner, but a trust is raised in favor of another growing out of the circumstances.

The equitable theory of *consideration* is the source and underlying principle of both *resulting* and *constructive* trusts, embracing this whole class of trusts by operation of law. The theory of *consideration* is one of the most beneficial conceptions of the early chancellors. The common-law idea of title and ownership rested mainly upon the observance of external forms and technical verbiage. But in equity it did not matter with what rigid solemnity the legal title had passed, the real beneficial ownership was found in the party from whom the *consideration* moved. If, under color of these forms, the holder of the legal title was guilty of fraud or other unconscientious holding, equity operated upon the *conscience* of the party, and upon the estate itself, and stripped the holder of the *colorable* panoply of *right*. Among strangers, equity requires a *valuable consideration*; among members of the family, a *good consideration* is recognized, especially in all *executed contracts*.

In the feoffment, title passed in *law* without a consideration, and if a charter of feoffment was delivered, the seal raised a conclusive presumption of consideration. Equity broke through this doctrine and established the rule, that if the conveyance of the fee was made without consideration, although the legal title passed to the feoffee, a use *ipso facto* arose and resulted in favor of the feoffor. Or, if a trust was declared at the time of the conveyance, either in writing (or by parol before statute of frauds), the same was enforced by the court of equity. So the inquiry has been in all these contests, coming from the forum of equity, who paid the consideration? For whose benefit was it paid? Who

* Haggard v. Benson, 3 Tenn. Ch., 268; 2 Pomeroy Eq., § 1030.

holds for value and *bona fide*, and who holds against justice and right? These rules did not operate so as to create a resulting trust in favor of the grantor in conveyances between parent and child and other family relations, since the "good" consideration of blood or marriage repelled the inference of a trust. In pursuance of the above principles, where a purchase is made by one person in the name of another, the party holding the legal title takes for the use of the one who advanced or paid the price.* If the purchase was made, however, by the parent in the name of the child, no use resulted to the parent paying the price, the purchase being presumptively regarded as an advancement.†

Trust Resulting to the Donor.—In addition to what is here said, it may be said that a trust results to the donor in the following instances: *First.* Where property is conveyed by will or deed upon some particular trusts or particular object, and these purposes fail in whole or in part, or the particular trusts are so uncertain that they cannot be carried into effect, or they lapse, or they are illegal,—in all these cases a trust, either with reference to the whole property or the residuum, results in favor of the grantor or his heirs, residuary legatees or devisees, or personal representatives of the testator.‡

Second. Where a Trust is Declared in Part only of the Estate Conveyed.—As a devise or deed in trust to pay debts after the debts specified are paid, a trust results.§

Third. In Conveyances without Consideration.—This head of the subject is not free from difficulty. If the deed acknowledges any pecuniary consideration coming from the grantee, this will repel the trust in favor of the grantor and create a trust in favor

* Spence, vol. i., p. 450; Story Eq., § 1201.

† Spence, vol. i., pp. 451-453; Finch v. Finch, 15 Ves., 43; 32 Beav., 370; 70 Me., 92; 14 W. Va., 809; 61 Ind., 595; 69 Penn. St., 239; 57 Miss., 471.

‡ Aston v. Wood, L. R., 6 Eq., 419; Hill v. Bp. of London, 1 Atk., 618; Ripley v. Waterworth, 7 Ves., 425; Nichols v. Allen, 130 Mass., 211; Easterbrooks v. Tillinghaast, 5 Gray, 17; Straat v. Uhrig, 56 Mo., 482; Bennett v. Hutson, 33 Ark., 762; McCallister v. Willey, 52 Ind., 382; Dawson v. Clark, 18 Ves., 247; Russ v. Mebius, 16 Cal., 350; Shaw v. Spencer, 100 Mass., 382; Power v. Cassidy, 79 N. Y., 602; Stephens v. Eli, 1 Dev. Eq. (N. C.), 497; Lemmond v. Peoples, 6 Ire. Eq., 137; Hawley v. James, 5 Paige, 318.

If the property, where the prior trust fails by lapse or otherwise, is given to some other person, then no trust results.

§ Pom. Eq., § 1034 (note 1).

of the grantee. Of course, if the conveyance contains a declaration of a trust, or is manifestly intended as a gift, no trust can result to the grantor or donor.

Mr. Pomeroy says: "If the doctrine has any existence under the conveyancing system of this country, so that a trust should result to the grantor from the absence of consideration, it can only be where the deed simply contains words of grant or transfer, and does not recite or imply any consideration, and does not in the *habendum* clause, or elsewhere, declare any use in favor of the grantee, and the conveyance is in fact not intended as a gift."* The intention of the donor must be gathered from the deed or instrument itself, and, as a general rule, the party is bound by the recitals in the deed. Even where the word "trust" or "trustee" is used, this may be shown to apply to one of two funds. The intention is to be gathered from the general scope of the instrument. So, if the deed recites a consideration from the vendee, this is sufficient to create the inference that a use in the vendee was intended. Of course, in case of *fraud* or *mistake*, the party aggrieved can show the actual transaction in parol. On this point, however, the case of *Russ v. Mebius*† contains an interesting opinion. The plaintiff was owner in fee of the land in question; he conveyed the same to his father, the only consideration being the verbal promise of the father to make a will and thereby devise to the plaintiff other lands of a stipulated value. The father died, still holding the land, but without in any manner performing his agreement with the plaintiff—without bequeathing to him any property. The plaintiff brought suit to establish the trust, and to compel a reconveyance of the land. The court said: "We are unable to see why the case does not fall within the doctrine as to resultant trust; the agreement was void, and the conveyance was executed without any consid-

* Pom. Eq., § 1035. "This distinction," says Story, "is to be observed, in case where the consideration, although purely nominal, is stated in the deed; if no use is declared, the grantee will take the use, and no trust results to grantor." 2 Story's Eq., 1199; *Russ v. Mebius*, 16 Cal., 350.

† *Russ v. Mebius*, 16 Cal., 350, citing Story's Eq., §§ 1197, 1198. The case of *Leman v. Whitley*, 4 Russ., 423, is a strong case against parol evidence to establish a resultant trust where the deed showed a consideration, but where, in fact, no consideration did pass; but, in the absence of fraud or mistake, it was held not allowable. *In accord*, see 1 Paige, 494.

eration, express or implied. It is shown that the transfer was not intended as a gift, and as there was no consideration, a trust resulted in favor of the plaintiff."

It follows that where a resulting trust may be shown by parol, it may be rebutted by parol. Facts in parol may be used to negative the presumption of a trust. In case of the trust arising from payment of the consideration, the presumption being in favor of the party paying the consideration, the *onus probandi* is upon the nominal purchaser.* It would seem that no good reason exists why, in many cases, the grantor as well as others should not be allowed to show by parol the real facts as to the consideration. It is well settled that the mere statement of the recital in the deed of the payment of the consideration is considered only as a receipt, which may be explained. That in England *assumpsit* will lie for the purchase-money, and generally, when the consideration is alone the subject of controversy, the recital in the deed is not conclusive of payment or the amount.†

It is held that where the deed recites the payment to be made by the person to whom the deed is made, it may be shown by parol that the payment, or a portion thereof, was, in fact, made by another, for the purpose of raising a trust.‡ The payment of a part gives the equity to the party so paying the part, to show the real transaction, and how much is paid, and for whose use, etc. In the case of *Hidden v. Jordan*,§ cited in the note, the plaintiff procured an agent to purchase land, and furnished \$2000; the agent made the purchase, paid the \$2000, and advanced, of his own means, a considerable sum, and took the title in his own name. The agent refused to recognize a parol agreement made by the parties, and claimed the land in fee. The court allowed parol evidence to show the real transaction and to establish a trust. No doubt this might be considered a case of fraud. But these illustrations are given to show that the only case in which the recital in the deed of the payment of consideration is conclu-

* Perry on Trusts, § 139, and cases cited; *Dudley v. Bosworth*, 10 Hump., 12; Sug. V. & P., 139 (9th ed.).

† *Belden v. Seymore*, 8 Conn., 304; *Shepherd v. Little*, 14 John., 210; *Webb v. Peele*, 7 Pick., 247; *Bowen v. Bell*, 20 John., 338. See ch. "Deeds."

‡ *Dudley v. Bosworth*, 10 Hump., 12; Sug. Vend., 139 (9th ed.).

§ *Hidden v. Jordan*, 21 Cal., 92.

sive, is to *repel the implication of a trust*. The vendor can sue for the purchase-money, and show the real amount, but he cannot show the actual facts to raise a trust. All parties who contribute to the consideration can show by parol the truth, regardless of the recital in the deed. The safe rule would seem to be that the recital that a valuable consideration had come from the vendee should be sufficient *prima facie* to repel the trust in the grantor.

Conveyance to A., Price Paid by B.—This form of resultant trust has already been incidentally noticed. The estate in equity follows the consideration. Many instances under this head are of daily occurrence in the courts, and it is familiar learning.

It is absolutely indispensable that the payment by the beneficiary B., or that an absolute obligation to pay should be incurred by him, *as a part of the original transaction of purchase*, at or before the time of the conveyance; no subsequent and entirely independent conduct, intervention, or payment, on his part, would raise a resultant trust.* If two or more persons together advance the price, and the deed is taken in the name of one only, a trust results to each in proportion to the sum paid. New York, Michigan, Minnesota, Wisconsin, Kansas, and Kentucky have statutes abolishing this kind of a resulting trust, and in all cases where the deed is made to the nominal owner by the consent of the owner of the consideration, it is declared fraudulent as to the creditors at the time of the person paying the consideration. The fraudulent intent imputed by the statute may be disproved. The acts do not apply to cases where the deed is thus made without the consent or knowledge of the person paying the money.†

The later cases in New York hold that the provision of the act applies to judgment creditors who have exhausted their remedies at law, and bring a creditor's suit.‡

Constructive Trusts.—This kind of trust is the result of actual

* Pom. Eq. Jur., § 1037; Farham v. Clements, 51 Me., 426; 53 Me., 403; 60 Me., 186; 4 Kent's Com., 300.

† New York R. S., pt. 2, ch. 1, art. 6, §§ 51, 52, 53; Michigan Comp. Laws, 1871, vol. 2, p. 1331, § 7; Minnesota Statutes (1880, Young's ed.), p. 553, § 789; Kansas Laws, 1881 (Dassler's ed.), p. 989, § 6; Indiana Statutes, 1876, vol. i, p. 915, ¶ 6, 7, 8; Kentucky Gen. Stat., 1873, p. 587, § 19.

‡ Ocean Nat. Bk. v. Olcott, 46 N. Y., 12; Dunlap v. Hawkins, 59 N. Y., 342. As to resulting trusts, see Houser v. Houser, 43 Ga., 415; Brown v. Crane, 47 Ga., 483.

or constructive fraud. Mr. Perry* well describes the instances in which a trust of this kind is held to exist. He says, "If one procures the legal title to property from another by fraud, by misrepresentation or concealment, or if a party makes use of some influential or confidential relation which he holds towards the owner of the legal title, to obtain such legal title from him upon more advantageous terms than he could otherwise have obtained it, equity will convert such party thus obtaining property, into a trustee. If a person obtains the legal title to property by such arts or acts, or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of a confidential relation and influence under such circumstances that he ought not, according to the rules of equity and good conscience, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction, and this trust they will fasten upon the property in the hands of the offending party, and will convert him into a trustee of the legal title, and will order him to hold it or to execute the trust in such manner as to protect the rights of the defrauded party who is the beneficial owner."

The instances in which this kind of trust arises are almost numberless, as numerous as the stratagems, devices, and unconscientious acts of men. But Mr. Pomeroy has given a group of these instances which I will simply state, without an attempt to illustrate each case.

1. *Those arising from contracts express or implied.*
2. *Money received which equitably belongs to another.*
3. *Acquisition of trust property by a volunteer, or purchaser with notice.*
4. *Fiduciary persons purchasing property with trust funds.*
5. *Renewal of leases by partners and other fiduciary persons.*
6. *Wrongful appropriation or conversion into a different form, of another's property.*
7. *Wrongful acquisition of the trust property of a trustee or other fiduciary person.*
8. *Trusts ex maleficio.*

* Perry on Trusts, § 166; see his whole ch. 6 on this question. As to resulting trusts, see ch. 5 of Perry on Trusts.

Under the head of *Trusts ex maleficio*, he subdivides as follows :

1. *A devise or bequest procured by fraud.*
2. *Purchase upon a fraudulent verbal promise.*
3. *No trust from a mere verbal promise.*

He gives illustrations : A person procures a devise or bequest through fraud, assuring the true owner that he will carry out his true original intent, and then refuses, after the death, to apply the devise or bequest to the benefit of the third person who is the real object, and who otherwise would have been the object of the testator's bounty, and claims to hold the property for his own use ; in such cases equity will enforce the obligation by impressing a trust upon the property in favor of the one who was defrauded.

Then the case of a man who obtains the legal title to land or other property under intentionally false and fraudulent verbal promises to hold the same for a certain specified purpose ; as, for instance, a promise to convey the land to a designated individual, or to reconvey it to the grantor, equity will charge the property with a trust.

But in a case of this kind there must be fraud, deception ; a mere verbal promise will not raise a trust in regard to land, because of the statute of frauds.

Statute of Limitations, in Trust, and Lapse of Time.—Mr. Hill, in his work on *Trustees*, says, "It has been laid down in general terms in some of the other cases, that the statutes of limitation do not run against a trust. However, this position, though generally true, must not be admitted without some qualification."*

Certainly, as between trustees and *cestui que trust*, an *express* trust, constituted by the act of the parties, will not be barred by any length of time, for in such case there is no *adverse* possession, the possession of the trustee being the possession of *cestui que trust*. Neither would the possession of the *cestui que trust* divest the legal title from the trustee.†

It is true, as suggested by Lord Hardwicke, that a conveyance or actual ouster of the trustee in favor of the *cestui que trust* might be presumed after a great lapse of time.

* Hill on Trustees, 264.

† Sanders, 310 ; Perry on Trusts, § 861.

It has been uniformly held in the United States, that in the case of an *express* trust, the statute of limitations does not begin to run as against the *cestui que trust* and in favor of the trustee, until there has been some open express denial of the right of the former, and what amounts to an adverse possession on the part of the latter.*

For the same reason that the possession of the trustee is not a bar to the possession of the *cestui que trust*, the possession of the beneficiary, however long, will not displace the legal title of the trustee. The holding in either case is not adverse. At law the *cestui que trust* occupies the position of a tenant at will, and cannot be ejected without previous demand of possession. Therefore, until the tenancy is terminated, there can be no adverse possession.†

But on this point, Mr. Hill, at page 267, says: "If there be a formal denial or disclaimer of the tenancy by the *cestui que trust*, or he continue to deal with the estate in a manner inconsistent with its subsistence, he may, doubtless, dispossess the trustee, and thus acquire an adverse possession, upon which the statutes of limitation will then operate, so as to vest in him an indefeasible legal title. However, it must always be a very nice and difficult question to determine whether and at what time such adverse possession on the part of the *cestui que trust* has been actually acquired; and a title, based on such a transaction, could never safely be accepted." So in action *inter partes*, an account has been ordered after forty-five years. This doctrine is ably discussed by Judge Caruthers in *Lafferty v. Turley*, admr., 3 Sneed, 157.

It is said, also, that if the plaintiff is not a *cestui que trust*, but only an equitable owner against a *bona fide* holder of the possession, that the limitations will apply as at law; because in that case the possession is adverse all the time, the person in possession never having recognized any right in the claimant.

If a debt is due the trustee the statute will bar, although the money was the property of *cestui que trust*.‡

* See the copious note 3 to Hill on Trustees, 264, in reference to American cases on this point.

† *Creigh's Heirs v. Henson*, 10 Gratt., 231; *Calvin v. Menafee*, 11 Gratt., 92; *Huntley v. Huntley*, 8 Ire. Eq., 250.

‡ *Perry on Trusts*; *Sheridan v. Joyce*, 7 Ire., 115.

The relation of trustee and *cestui que trust* must be still subsisting to prevent the operation of the statute; for if the trustee, with full knowledge of the *cestui que trust*, has divested himself, by parting with the legal estate and settling his account, and obtained a release from the person beneficially interested, in the absence of fraud, the court will be reluctant to entertain an action arising out of the trust transactions, where the lapse of time would constitute a bar in ordinary cases. The statute will also operate as a bar where the relation never actually existed, though intended to be created.*

If the Trustee be barred, the Beneficiary is also barred.—While the statutes of limitation do not apply in controversy between trustee and beneficiary, and among *cestui que trusts*, as to third parties the rule is quite different. It was thought by some of the earlier writers, that, if the trustee failed to bring the action until the period of limitation passed, the *cestui que trust* was not barred; but this, for obvious reasons, could not be the law. So it is well settled that where a stranger is a party, and the trustee and *cestui que trust* are both out of possession for the period of limitation, the action is barred.†

In the case of *Woldridge v. Planters' Bank*, 1 Sneed, the Supreme Court of Tennessee held that, if the statute had begun to run, it would not be suspended because of the death of the trustee and a failure to appoint a successor, even in the case of an infant *cestui que trust*.

The opposite of this doctrine was maintained in an early case by Lord Macclesfield, who overruled the plea of the statute of limitations, on the grounds that the legal estate was in a trustee.‡ And one or two other cases held that the forbearance of the trustee, in not doing what his office required him to do, should not prejudice the *cestui que trust*.§ But Lord Hardwicke, Sir William Grant, M.R., and Sir Thomas Plumer, M.R., all de-

* Hill on Trustees, 265 (note 2).

† Herndon v. Platt, 6 Jones Eq., 327; Flemming v. Gilmer, 35 Ala., 62; Mason v. Mason, 33 Ga.; Crook v. Glenn, 30 Md., 55; Perry on Trusts, § 854; Welborn v. Finley, 7 Jones Eq., 288; Hill on Trustees, 267; 81 E. C. L., 652; Elmendorf v. Taylor, 10 Wheat., 152; Williams v. Otey, 8 Hump., 563; Woldridge v. Planters' Bank, 1 Sneed, 297; Worthy v. Johnson, 10 Ga., 353.

‡ Lawley v. Lawley, 9 Mod., 32.

§ See Cowland v. Douglass, 4 Ala., 206.

cided that the existence of the legal estate in the trustee did not prevent the operation of time as a bar as between parties claiming adversely to the equitable interest. The doctrine was sustained on an appeal to the House of Lords.* The weight of authority is also in favor of the proposition that the stranger is protected by the limitations, although the *cestui que trust* is an *infant*. But Mr. Hill suggests that this point may be open to argument.† The stranger will be protected, although the *cestui que trust* is a *feme covert*. This was decided in a very able opinion in Maryland in 1868.‡

But it would seem that if the *trustee* is under any disability, the statute of limitations would not begin to run until that disability ceased, though Mr. Hill thinks this point has never been definitely decided.

There is much reason for the proposition, that where the legal title is in the trustee having the right to sue, and having a duty imposed in behalf of the beneficiary, that the limitation should protect the stranger, although the beneficiary is an *infant*. In a case of this kind there is not the necessity for the saving of the statute in favor of infants, because he has a friend who can assert his rights, and, as a general rule, will do so. The object of the statute is to quiet titles, and to serve the ends of justice at the same time.

Take the case of a stranger, who is a *bona fide* claimant of the possession for twenty years; the trustee having had the legal title with an equity attached, fails to sue; in the meantime, however, the claimant of the equity is an *infant*; now, shall the *infant* have the right to disturb the possession of the *bona fide* holder?

The *laches* of the trustee may create a personal liability, which may, in many instances, constitute some relief to the beneficiary. And the ends of justice would be better subserved by holding that, if the trustee was under any disability, the limitation should not apply until the same is removed. But on this point the remark of Mr. Hill may be commended. He says: "On

* *Melling v. Leak*, 16 C. B.

† *Hill on Trustees*, 268 (note), 3; *Blake v. Allman*, 5 Jones Eq., 407; *Sanders's Uses and Trusts*, 294.

‡ See *Crook v. Glenn*, 33 Md.; *Wych v. East India Co.*, 3 P. Wms., 309, opinion of Chancellor Talbott.

the whole, it must be admitted that the effect of the statutes of limitations, as applied to the estate of trustees, is left in a very unsatisfactory state by the authorities, and it is extremely difficult to gather from them any very definite rules of general application on this point."

There is another doctrine, a kin to the idea of limitation; that is, the indisposition of courts of equity to enforce a right after a long and unreasonable *lapse of time*; in other words, they are indisposed to enforce a *stale claim*. And even between trustee and *cestui que trust*, where the delay has been wilful and for an unreasonable time, with a full knowledge of the rights involved, courts will frequently hold the *lapse of time* as a bar. In this regard, each case is dependent upon its own peculiar facts and circumstances; one case may present wilful acquiescence on the part of the beneficiary, while another may present concealments and frauds on the part of the trustees.*

The Statute of Limitations is a Bar to Trusts raised by Implication of Law.—The English statutes of 32 Henry VIII. and 21 James I. applied only to courts of *law*, but the more recent statutes of 3 and 4 Will. IV., chap. 27, and 9 Geo. IV., apply equally to courts of equity. Where the matter is of a concurrent jurisdiction between the courts of law and equity, the statutes of limitation are applied; but where the matter is of exclusive equitable jurisdiction, the courts of equity apply *lapse of time*.

Courts of equity are bound by the statutes of limitations.†

Express trusts, among which are classed executors and administrators, and perhaps many other statutory trusts, come within the strict jurisdiction of a court of equity, and while the statutes of limitations do not apply, yet it is said, perhaps in analogy to the law, the court will frequently apply *lapse of time*. Relief is rarely given after the *lapse of twenty years*; these courts have refused to enforce an equity of redemption after twenty years.‡

Under the 34th section of the Judiciary Act of 1789, the statutes of limitations, as a general rule, applied in the United States

* *Lafferty v. Turley, adm.*, 3 Sneed (Tenn.), 157.

† *Angell, Lim.*, 20 (notes); *Bank of the United States v. Daniels*, 12 Peters; *Lawrence v. Trustees*, 2 Denio (N. Y.), 577.

‡ 4 Kent Com., 187 (eleventh edition); see authorities collected in Hill on Trustees, page 264.

courts, are those of the several States; they follow the construction placed on the same by the State courts.*

But when the trust is raised by *implication of law*, the statutes of limitations form a complete bar. On this point the reader is advised to consult Angell on Limitations, chap. 35, with the full notes on this point.†

As an illustration: If A. takes title to himself, having paid for the land with the money of B., here is a trust by implication in favor of B., which he must assert in the time allowed by the statute, say, seven years, if that be the limit to the right of entry. So, a party, holding property in many ways in which he is liable to be converted into a trustee by a decree of a court of equity, is generally protected by the statute of limitations, or can rely on estoppel from lapse of time.

In cases of this kind, the special fiduciary relation does not exist, as in the case of an express trust, and the possession is of an adverse character all the time.‡

Perhaps the leading English authority upon this point is that of Beckford v. Wade (17 Vesey, 87). The opinion was by the Master of the Rolls on the construction of a statute of limitations for Jamaica, 4 Geo. II., who used the following language: "The question then is, what is the true construction of the act in this particular? whether it meant only actual and express trusts, as between *cestui que trust* and trustee properly so called, upon which length of time ought to have no effect, or whether it intended to leave open to perpetual litigation every equitable question relating to real property. If it did so intend, it was ill calculated for obtaining its professed purpose of quieting possession and of preventing many vexatious and expensive suits at law and in equity, of which the preamble complains. I hardly know how, according to this construction, any suit in equity would be barred by this act. Upon what grounds is a court of equity ever called upon to direct one man to convey a real estate to another except

* McClury v. Silliman, 3 Peters (U. S.), 270; Larman v. Clark, 2 McLain (Cir. Co. R.), 572.

† Prevost v. Gratz, 6 Wheaton, 481.

‡ Davis v. Cotton, 2 Jones, Eq., 430; Prewett v. Buckingham, 28 Miss., 92; Cunningham v. McKinley, 22 Indiana; Howell v. Howell, 15 Wisconsin; Porter's Lessee v. Cocke, 4 Tenn. Reports (Cooper's edition): the opinion in Porter's Lessee v. Cocke by Judge Catron, while on Supreme Bench of Tennessee.

upon grounds of trust, either actual or constructive? When the act speaks of one man being seised or possessed to the use of, or in trust for another, I can hardly conceive that it means any other than an actual direct trust, not such possible eventful trust as may, in case certain facts are established in evidence, be declared by a court of equity against a person who is *prima facie* the true owner. Questions of this kind always depend upon controverted facts." In this case the Master of the Rolls quotes from what Lord Commissioner Ashhurst said in *Townsend v. Townsend* (1 Bro. C. C., 550), as follows: "Trust being an exception to the statutes of limitation, the rule holds only between trustee and *cestui que trust*. It is true that a trustee cannot set it up against a *cestui que trust*; but this case being merely that of a trustee by implication, and, as such, affected by an equity, that equity must be fostered within some reasonable time." These opinions embody the whole law on this point in a very precise and accurate statement of the same.*

Another eminent English authority upon this point is Lord Hardwicke, who observes: "Courts of equity, by their own rules, independent of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar, in equity, of any particular demand."

The more recent English statute of limitation, 3 and 4 Will. IV., chap. 27, has the following title: "For the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto;" it has the following, section 24: "That after the 31st day of December, 1833, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right in or to the same, as he shall claim therein in equity."

But this act does not materially affect the doctrine as applied to express trusts, for the 25th section of the same act provides

* See also *Jones v. Person*, 2 Hawk. (N. C.), 269.

that the time shall not run against an express trust until the land or rent vested in the trustee shall have been conveyed by him to a purchaser for a valuable consideration, and that it shall then run only in favor of the purchaser and the parties claiming under him.*

In Case of Fraud the Statutes of Limitations do not Run until Fraud is Discovered.—Sec. 26 of 3 and 4 Will. IV., chap. 27, provides, "In cases of *concealed fraud* the right of the *cestui que trust* is deemed to have first accrued at the time at which such fraud shall or with reasonable diligence might have been known. But then, not against *bona fide* purchasers without a knowledge of fraud."† There is some difference among the cases as to the effect of concealed fraud in actions at law strictly; but in a court of equity the party defrauded is not affected by the lapse of time before the discovery of the fraud, or at least before the same might have been known by reasonable diligence.‡ The code of North Carolina, adopted in 1868, has the following, § 34, sub-section 9: "An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by courts of equity, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud."

The case of *Blount v. Parker*, 78 N. C., was decided after the code went into effect, the court holding that § 34 of the code did not change the law. The position is sustained by *Hamilton v. Shepherd*, 3 Murphey, 115, and *Troupe v. Smith*, 20 Johnson (N. Y.), 33.

The State of Massachusetts in the case of the First Massachusetts Turnpike Company *v. Field et al.*, 3 Mass. Rep., 201, has taken the opposite view, holding that the statutes of limitations do not apply in case of *fraud* until discovered even in actions at law. Chief Justice Parsons, in the opinion, refers to two or three old English cases to sustain the opinion. The case is certainly a strong case from the facts.

The defendants pleaded the statute of limitation, and the repli-

* Hill on Trustees, 264 (note 11); 2 Smith's Leading Cases, 622 (note to *Neopon v. Doe*).

† 2 Smith's Leading Cases, 629.

‡ Augell on Limitations, ch. 16; Hill on Trustees (note 3).

cation to the plea averred "that the defendants fraudulently and deceitfully concealed the bad foundation, the unsuitable materials and work unfaithfully executed, by covering the same with earth and smoothing the surface, so that it *appeared* to the plaintiffs that the contract had been faithfully executed."

If any case could justify the rule in a court of law this certainly is strong enough. Massachusetts has no separate chancery court, and it would seem that a statute to meet such cases would have an existence in that State.

But with the exception of this case in Massachusetts, the entire weight of authority is the other way. In *Troupe v. Smith*, 20 Johnson Rep., 33, the doctrine is maintained that in no case does fraud prevent the running of the statute in matters purely cognizable in a court of law. Chief Justice Spencer, of the Supreme Court of New York, says that the *dictum* of Lord Mansfield is the only instance in which such a position was ever advanced in Westminster Hall, and gives as a reason for the dictum that Lord Mansfield was not favorably impressed with the powers assumed by courts of chancery. He further said there is a marked and manifest distinction between a plea of limitations in a court of law and a court of equity. In a court of equity the reason that the statute ought not to form a bar is, that it *ought not in conscience to run, the conscience of the party being so affected that he ought not to avail himself of the lapse of time*. After this decision the question came before Chancellor Kent, in the case of *Kane v. Bloodgood*, 7 Johnson Ch. Reports, 90, in which, after the most elaborate argument on both sides, Judge Kent delivers a very profound and exhaustive opinion, holding the doctrine that fraud is not a bar in courts of law.*

He says in this opinion: "This rule, the trusts not intended by the courts to be reached or affected by the statute of limita-

* "So general is the condemnation of all fraudulent acts by the common law that a fraudulent estate is said, in the masculine language of the books, to be no estate in the judgment of law. It forfeits the protection of every statute which gives confirmation to doubtful titles, and while a disseisor has the benefit of the statute of *fin*es and of limitations in support of his wrongful title, a title acquired by *cov*in is indefinitely open to be disputed; and even acts, as well judicial as others, which of themselves are just and lawful, if infected with fraud, are in judgment of law, vicious and unavailing." Roberts on Fraud Cov., 520, ch. 5, sec. 1.

tions, are those technical and continuing trusts, which are not at all cognizable in a court of law, but fall within the proper, peculiar and exclusive jurisdiction of a court of equity." He argues that courts of equity are bound by statutes of limitation in all matters of a legal nature, or in all those cases where a court of law can take jurisdiction. As in the case of *assumpsit* on account, simply because the party might go into equity to have an account does not prevent the limitation being applied. If the jurisdiction is concurrent then equity follows the law and the statute is regarded. There are many classes of trusts over which courts of law have exclusive jurisdiction, such as the different kinds of bailment, which comprise so much of the practical business operations of the country. A. deposits \$100 with B. for the benefit of C. B. is a trustee for C., and can be sued in a court of law by C., who is the beneficiary, and of course no action can be sustained after the limitation prescribed by the statute has passed.

This is the law as it now stands, in the absence of special statutory regulations. There are cogent reasons furnished by the innumerable number of frauds daily perpetrated, for a statute providing that both in courts of law and equity, where there is fraudulent concealment, no cause of action shall accrue to the aggrieved party until the fraud is known.

Take the facts in the Massachusetts case before stated; and take the case of the man who steals a horse, moves him to a retired portion of the country, and sells him; the aggrieved party, after the lapse of three years, discovers the whereabouts of the horse, but the statute has barred the action for the value of the horse.

Perhaps the thief himself could hide the horse for three years, and when sued could plead the statute of limitations. In a case of this kind, a court of *law* should, at least, have the sanction of the legislature for a *conscience*.

So it appears that the loose expressions found in the books, that the statutes of limitations do not apply in cases of *trust* and *fraud* are not technically accurate; the cases in which they do apply, and those in which they do not apply, present the only difficulty.

The Duties and Obligations of Trustees.—The limits assigned to this treatise will not allow me to enter this broad field. Much of their duties and liabilities has been shown by the discussion of the *Law of Trusts* and the *Rights of the Beneficiary*. The following trustees are mentioned and their duties portrayed by Mr. Hill in his work on Trustees:*

1. Trustees of executory trusts.
2. Trustees for the payment of debts.
3. Trustees for the payment of legacies.
4. Trustees for raising portions.
5. Trustees for tenant for life.
6. Trustees for infants.
7. Trustees for married women.

In these cases, the *cestui que trust* is not entitled to the absolute control of the property. In law the title vests in the trustee, and he alone can sue at law.

CHAPTER XVI.

THE SEPARATE ESTATE OF THE WIFE IN REAL PROPERTY— MODES OF CHARGING THE SAME BY CONTRACT, EXPRESS OR IMPLIED—HER RIGHTS, LIABILITIES, ETC.

IN both the courts of law and equity a variety of controversies arise in regard to the property of married women. Says Judge Kent, referring to Coke, Littleton, and Blackstone, "The legal effects of marriage are generally deducible from the principles of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended during the continuance of the matri-

* These trustees represent active direct trusts. It is the peculiar province of a court of equity to enforce the rights of the beneficiaries and *cestui que trusts* in all these cases. The student is advised to consult Hill on Trustees, Lewin on Trusts, Perry on Trusts, Pomeroy's Equity Jurisprudence, Spence's Equity, Hilliard and Washburn on Real Property, and, of course, Story and Kent on the doctrine of Trusts.

monial union. From this principle it follows, that at law no contracts can be made between the husband and wife without the intervention of a trustee."*

The Rights of the Husband at Common Law.—"If the wife, at the time of marriage, be seised of an estate of inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and profits during their joint lives. It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life if he dies before his wife, and in that event she takes the estate again in her own right. If the wife dies before the husband, without having had issue, her heirs immediately succeed to the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, tenant by the curtesy, and on his death the estate goes to the wife or her heirs, and in all these cases the emblements growing upon the land at the termination of the husband's estate go to him or his representative."†

The following legal propositions may be deduced in regard to the real property of *feme covert*s under the common law:

1. During the continuance of the life-estate of the husband, he sues in his own name for an injury to the profits of the land.
2. For an injury to the inheritance, the wife must join in the suit, and if the husband dies before recovery the right of action survives to the wife.
3. The husband cannot be sued at common law by the wife for waste committed during the coverture.
4. The interest of the husband in the freehold estate of his wife is subject to execution in favor of his creditors, except as changed by statute.
5. A court of equity would stay by injunction the husband's waste at the suit of the wife herself.
6. Also, the purchaser of the husband's interest at execution-sale could be enjoined from committing waste, at the suit of the wife, in which suit the husband must join.

* 2 Kent Com., 129; Coke Litt., 112; 1 Blackstone Com., 441.

† 2 Kent Com., 131; Coke Litt., 29a.

7. The heir of the wife may sue the husband for waste, either before or after assignment by such husband.

8. If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are both seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole.

9. The husband alone may grant or charge the wife's land during their joint lives, and if he be tenant by the curtesy during his own life.

10. The husband can do no act or make any default to affect or work any prejudice to the wife's inheritance or freehold, and after his death she has a right of entry.

11. If the wife only hath an estate for her own life, the husband is entitled to the profits during the marriage, and on her death the husband has no further interest.

12. If the wife have an estate for the life of another person, who survives her, the husband becomes a special occupant of the land during the life of such other person and no longer; but his representatives take as emblements the crops growing at his death.

13. The husband has the right to the possession of the wife's *chattels real*, such as leases for years, and can, without her, sell, mortgage, or otherwise dispose of the same as he pleases, by any act in his lifetime. And they are liable to execution for his debts.*

14. If the husband makes no disposition of the wife's *chattels real* in his lifetime, he cannot devise the same by will, but the wife at his death will take the same in her own right without being executrix or administratrix to her husband.

15. If the husband survives the wife, the common law gives him her *chattels real* absolutely, by survivorship, being in possession during the coverture by a kind of joint-tenancy with the wife.

16. The husband cannot get pay for improvements on the wife's lands. It is not within the province of this treatise to discuss issues in regard to *personal* property; but the mere state-

* It is said for want of privity the heir cannot bring waste against the assignee of the husband. And for the same reason it is said that if the heir grants over the reversion, the grantee cannot sue the husband. 2 Kent, 132, note c.

ment of the legal status of the wife's personal property, under the common law, will tend to show the marked difference in the principles and rulings of the courts which apply to the two kinds of property. The personal property of the wife reduced to possession by the husband, becomes *his* property by virtue of the *marital right*. The debts due the wife at the time of the marriage, or afterwards, by bond, note, or otherwise, and which are termed *choses in action*, did not vest absolutely in the husband, but he had the power to sue for and recover the same.

The same rule applied to a legacy or distributive share which accrued to the wife during coverture.

If the husband died without reducing the *choses in action* to possession, the wife would be entitled to the same in her own right without administering on the estate of the husband.

If the wife dies before the *choses in action* have been reduced to possession, it does not, in the strict sense, survive to the husband, but he is entitled to recover the same to his own use by acting as her administrator. This rule, however, has been changed or modified by statute in some of the States.

If the husband resort to a court of equity for assistance in obtaining possession of the wife's *choses in action* or other property, the court will require him to make suitable provision for the wife and children. This is called the "*wife's equity*."

This distinction between the personal and real property of the wife being stated, the attention of the student is turned to the power and mode of disposing of the real estate of the wife under the common law and statutory regulations. Because, in the controversies in regard to real property, the conveyance of the wife, the capacity of the wife under statutory regulations, and the mode of making these conveyances effectual in law or equity, constitute a large field of learning. In trials of this kind, if it appears that the property has at any time belonged to a married woman, and passed from her during coverture, these principles of law will be called into requisition.

What Necessary to Pass Title from the Feme Covert.—In England the earlier law required the wife to pass her freehold estate by a fine and a common recovery, in which the husband was required to join. The English statute of 3 and 4 Will. IV., ch. 74, abolished fines and recoveries, and married women, with

the concurrence of their husbands, were allowed to dispose by deed, or relinquish any estate they may have, provided the wife acknowledged the same before a competent officer, on a previous examination apart from her husband. By the early colonial statutes, it was provided for the conveyance of the *feme covert* by deed, and this more simple mode of conveyance prevails throughout the United States. The husband is required to join in the conveyance or release of the wife's land. The reason stated is, that the husband's assent might appear on the face of the deed, and to show he was present to protect her from imposition, a duty imposed on him by the marital relation. In some cases, and generally in England, if the wife has a *separate* estate, a court of equity looks upon her as a *feme sole*, who has the power of disposition without the concurrence of the husband. But this latter question will be noticed more fully when we come to discuss the wife's *separate estate* in the technical sense.

It is well to state as a general principle, that those statutes providing the mode of the wife's disposition of her real property being in derogation of the common law, they must in substance be complied with.

On this point, Mr. Bishop says:* "A careful conveyancer, like a careful pleader, will always follow the statute on which he proceeds to the letter, because thus all questions are avoided," and, if forms employed accord with a long-established usage, they should not be ignored.

In the States which require the wife's privy or separate examination before a designated officer, the deed is void as to her without a compliance with the statutes in this regard, and it is void if the certificate of the officer required to take the acknowledgment fails to show a substantial compliance with the statute.† So, if there is no acknowledgment, or, if one, not before the proper officer, the deed is void and cannot be read in evidence if opposed. In Pennsylvania the question arose whether, under the statute of that State, the deed was good when a third

* Bishop on the Law of Married Women, § 589; O'Ferrall v. Simplot, 4 Greene (Iowa), 162; Elliott v. Pearce, 20 Ark., 508; 29 Ala., 662; 4 Texas, 61; Barbee v. Taylor, 6 Jones (N. C.), 40.

† See authorities on this point, collected in note to § 591 of Bishop's Law of Married Women.

person remained in the room with her and the magistrate after the husband had withdrawn. But the court held that "our act of Assembly requires not a privy examination; it is sufficient if the *feme covert* be examined separate and apart from her husband."

Perhaps, if the statute requires a privy examination of the wife, then it should be in the absence of *others*, as well as the husband. The particular wording of the statute might control the construction of the courts on this point.

Evidence of Wife's Acknowledgment.—The *certificate* of the officer authorized to take the acknowledgment, it appearing on the face of the same that the law has been substantially complied with, is the complete evidence. No defect in the *certificate* can be supplied by the testimony of this officer, neither is it competent to offer other parol testimony. On this point Mr. Bishop says, § 591, vol. i.: "In Ohio, it has been laid down that, in the absence of fraud, the magistrate's certificate is conclusive evidence of the facts therein stated; in Indiana, that it is to be presumed correct, the contrary not appearing; and, in Pennsylvania, that, if the certificate is in fact false, and the grantee knows it to be so, or knows any circumstances which would put an honest man on inquiry, parol evidence may be introduced to control it, when, if the examination is shown to have been in the presence of the husband, or it is shown that the woman was not informed of the nature of the transaction, or she is shown to have acted under either moral or physical compulsion, the deed will be worthless as against her. The doctrine, perhaps, appears to be, that evidence of the certificate is conclusive against her in favor of a perfectly *bona fide* grantee, yet in favor of no other. Still, if the grantee acted in good faith, yet the wife did not, in fact, make any acknowledgment, or acknowledged the deed under a duress known to the magistrate, it would be contrary to the ordinary dealings of the law with wives or with any other persons to hold her bound by this certificate.

"If the grantee let his own caution sleep, though he was not dishonest, he, in just principle, rather than the wife, who was without even the fault of carelessness, should suffer the consequences, and so the law is believed to be."*

* Baldwin v. Snowden, 11 Ohio St., 203; 5 Ohio St., 319; Flemming v. Potter, 14 Indiana, 486; Loudon v. Blythe, 3 Casey, 22; Stone v. Montgomery, 35

The *form* of the certificate should *substantially* follow the statute. The following illustrations, as given by Mr. Bishop, will suffice, one case from each of the States of Ohio, Alabama, and Pennsylvania :*

In Ohio, it was provided as follows, in regard to the certificate: "If, upon such separate examination, she (the wife) shall declare that she did, voluntarily, sign, seal and acknowledge the same (deed), and that she is still satisfied therewith, such officer shall certify such examination and declaration of the wife, together with the acknowledgment as aforesaid on such deed," etc.; and the following was held sufficient: "The said M., being by me examined separate from her husband, declared that she signed the same of her own free will and accord."

The reader perceives that this certificate departs more widely from the statute than any good conveyancer would tolerate in his own practice; yet, said J. R. Swan, Judge: "We are of the opinion that the certificate in question, under the adjudications of this court, substantially complies with the requirements of the statute."

In Alabama, where the statute required an acknowledgment by the wife upon the deed, that she "signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her husband," and the certificate stated that she "signed, sealed and delivered the above instrument of mortgage-deed on her own free will and accord, and without any force, persuasion or threats from her said husband, and for the express purpose therein stated;" this was adjudged to be insufficient—the execution of the deed did not, by these words, affirmatively appear to have been without "fear."

In a Pennsylvania case, "The counsel for the defendant," said Tilghman, C. J., "has contended that it substantially appears the wife was examined separate and apart from her husband, because it is certified by the magistrate that she voluntarily consented, which she could not do if her husband were present, because then it would be presumed that she was under coercion.

Miss, 83; Woods v. Polhemus, 8 Ind., 60; Michener v. Cavender, 2 Wright (Penn.), 334.

* Browder v. Browder, 14 Ohio St., 539; Boykin v. Bain, 28 Ala., 332-339; Jourdan v. Jourdan, 9 S. & R., 268, 273.

This argument is too refined. A separate examination is essential, and ought sufficiently to appear."*

It has already been stated that the husband must join in the deed with the wife, and this upon the principle of common law, that the wife can do no valid act without the concurrence of her husband. If the statute expressly require the husband to join in the conveyance, the deed is void without, and, in such case, the fact of the husband's assent could not be shown by parol.† It has been held, in some cases, that, under the wording of a particular statute, the husband and wife might make the conveyance by separate deeds.‡

"The execution of a deed includes its delivery, and therefore the adjudication of a probate judge, that the execution has been duly proved, is a judicial determination of the fact of delivery, which cannot be collaterally impeached."§

What is meant by the Husband "Joining" in the Deed.— Suppose the wife's name alone appears in the body of the deed, and she signs the same, and the husband signs with her. It has been held in New Hampshire and Mississippi that, if the husband's name is signed to the deed, that supersedes the necessity of his name appearing in the body of the deed as a grantor. It is said the reason for putting the name of the grantor in the deed is to make certainty of the grantor, and that certainty is obtained whenever a person signs, seals, acknowledges, and delivers an instrument as his deed, though not mentioned in the body of it. And that the reason of the statute in requiring the conveyance by the joint deed of husband and wife is that it be made by the husband's assent; and that his signing the deed is sufficient evidence of his assent, and would operate as an estoppel on him as against the grantee.||

In North Carolina a different doctrine has been held, in which they say it is void as to the husband, because he is not a party, and void as to the wife because of coverture.¶

* 1 Bishop on Law of Married Women, § 592.

† Trimmer v. Heagy, 4 Harris (Pa.), 484; 1 Bishop, § 593.

‡ Strickland v. Bartlett, 51 Maine, 355; 1 Bishop (L. M. W.), § 593.

§ Redman v. Graham and Wife, 80 N. C., 231.

|| Elliot v. Sleeper, 2 N. H., 525; Woodward v. Seaver, 33 N. H., 29; Stone v. Montgomery, 35 Miss., 83.

¶ Gray v. Mathia, 7 Jones (N. C.), 502; Kerns v. Peeler, 4 Jones (N. C.), 504.

While the reasons given in the New Hampshire and Mississippi cases appear quite conclusive, perhaps the weight of authority is in favor of the husband's name appearing in the body of the deed as grantor, as well as to sign the same.

In the deed of the wife words must be used by her conveying the estate; it is not sufficient for the husband alone to use such words, though he unite in signing and acknowledging the same.*

Of course, if there be a defective acknowledgment, the wife may cure this during the coverture by making a fresh acknowledgment. If the wife makes a deed which is void, for the reasons above stated, she may, after she becomes discoverd, acquiesce in the contract stated in the deed. A mere parol adoption would not be sufficient, because of the statute of frauds; but either a new delivery, or what amounts to a new deed, would be necessary. "The redelivery, or its equivalent, must also be done with the knowledge of the defect, and with the intent thereby to cure it."†

It has been held, however, "that if the deed of a *feme covert* be executed in due form, but not delivered during the lifetime of the wife, it cannot be made, by delivery after her death, to pass her estate as against her heirs."‡

The Wife may take by Deed—in what Way.—Although a *feme covert* has no right to contract at common law, she may take an estate from a third party, subject to her right of dissent on becoming discoverd. Judge Kent says: "A wife may purchase an estate in fee without her husband's consent, and the conveyance will be good if the husband does not avoid it by some act declaring his dissent; and the wife, after her husband's death, may waive or disagree to the purchase."§ And we shall see that, in equity, she can hold by deed from the husband himself, or from any other person who conveys to a trustee for her use; and, in fact, she takes under any deed which creates a trust in her favor.

The Wife cannot be compelled to carry out an Executory Contract.—It is true the married woman has the power to convey her lands in the mode pointed out by law, yet the completion of an

* 1 Bishop, Law Married Women, § 594, and note 1, where the cases are cited.

† Bishop, § 598.

‡ Ibid.

§ 2 Kent Com.; Litt., sec. 677; Blacks. Com., 292.

executory contract is a matter for her own action. If she makes a contract to convey it cannot be enforced. It is true that, if she has received the purchase-money, she should not be allowed to avoid the contract without refunding the money. The disability of coverture or infancy should not enable the party to commit fraud.

To say that the wife could be *compelled* to submit to a privy examination would be an absurdity, in view of the law of married women.

If the husband stipulates that the wife shall join in the conveyance, a court of equity could not exact specific performance. It would be an attempt to compel a party to do what he had no power in law to do, which was known to the other contracting party.

The husband in a case of this kind, especially if fraud is shown, might subject himself to an action at law. A man who would risk his money on the idea that the contracting husband could have the same made effectual by the coercion of the wife is, to say the least, not quite wise enough.

The Wife cannot Convey by Attorney.—Without some statutory regulation the wife cannot convey her lands by attorney. The wife certainly could not make a privy examination by attorney. Perhaps, under the construction of some statutes, there might be such a formal execution of the power of attorney as to authorize the same.

In the case of *Mott v. Smith*, 16 Cal., 533, the court says: "A married woman cannot invest another with a power to sell any interest which she may possess in real estate, in the absence of any statute to that effect, and there is no such statute in this State. To the efficiency of a conveyance by a married woman, it is essential that she join her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him or compulsion, or undue influence from him, and that she does not wish to retract its execution. This private examination and determination of the will, as to the retraction of the execution, are not matters which can be delegated to another." In that State, several imperfect conveyances of this

kind were ratified by an act of the legislature.* A different doctrine was held in some of the English cases, where the wife conveyed by fine and recovery, but the doctrine was finally settled as stated above.

The Wife's Warranty Void.—It was held a long time ago in England, that if the husband and wife granted land by fine, with warranty, and the grantee should be evicted by title paramount, covenant would lie after the husband's death against the wife upon the warranty.

Judge Kent says this holding is a "very strong case, to show that the wife may deal with her land by fine as if she were a *feme sole*, and what she may do by fine in England, she may do here by any legal form of conveyance, provided she execute under a due examination."

It was further said in some of the old books, that if the husband and wife make a lease for years of the wife's land, and she accepts rent after the husband's death, she thereby affirms the lease, and therefore liable on her covenants, although she was at liberty to disaffirm after the husband's death if she chose so to do.

But in this country the courts uniformly hold, that it is contrary to the settled principles of the common law, that the wife should be held bound by her covenants made during coverture.

The agreement by a *feme covert* to convey her land, even with the consent of the husband, is void in law, and the courts of equity to this extent, follow the law, and refuse to enforce such a contract against the wife.† It was held, in one of the Massachusetts cases, *Lowell v. Daniels*, that the warranty, inserted in the deed of the wife, would not estop her from asserting a subsequently acquired interest in the same land. But it seems more reconcilable to the principle, that coverture is no protection in case of fraud; that, in many instances, the covenant of the wife should at least operate as an estoppel on her.

* *Deutel v. Waldie*, 30 Cal., 138. See 2 Kent Com., 169. See on this point, *Hulmes v. Thorpe*, 1 Halst. Ch. (N. J.), 415.

† 2 Kent Com., 168 (note c); Bishop, *Law Married Women*, vol. i., § 603, and authorities cited in note 4; *Fowler v. Shearer*, 7 Mass., 21; *Colcord v. Swan*, *Ibid.*, 291; *Jackson v. Vanderheyden*, 17 Johns., 167; *Lowell v. Daniels*, 2 Gray, 161; *Watkins v. Halstead*, 2 Sandf. (N. Y.), 311; *Dominick v. Michael*, 4 Sandf. (N. Y.), 374.

The law being that the wife is not liable on her warranty, has nothing to do with the title which passes by the deed. The title will pass just as effectually without a warranty, which is not an essential part of the deed.*

The same authorities hold, that "if there is a covenant running with the land,—as, for example, a covenant in the deed of the wife's grantor to her,—her grantee may avail himself of it."

To Whom and for what Purposes the Wife may Convey.—The wife, the husband joining in the deed, may convey to any person capable of contracting and holding real estate, subject to all the rules and requirements as to consideration and fraud which apply to conveyances by other parties. The only exception, perhaps, is, the wife's incapacity to convey to her husband, but she may convey for the benefit of her husband. She may mortgage her lands to secure a debt of the husband, in which also the husband joins in the conveyance, in which transaction, as between the two, she stands as surety for the husband. Properly speaking she is not a surety, but she is so called by analogy; in equity, she would have a right to call upon the husband to exonerate her estate from the debt.

But in case of the bankruptcy of the husband, the exoneration is nothing more than a right, after she has paid the debt, to participate in the dividends with other creditors.†

In the case of *Newhart v. Peters*, the wife had borrowed money of the plaintiff and given a bond for payment, and, to secure which, she and her husband executed a mortgage on her real estate. On a suit to foreclose, the position was taken that the husband did not join in the *contract*, and therefore she did not bind her land in giving the mortgage. This, too, the wife's own debt, and the bond and mortgage executed the same day.

In this case *Smith, C. J.*, says: "The doctrine that a *feme covert* can make an absolute deed for her lands but cannot mortgage them, involves the absurdity of allowing her to deprive herself

* Bishop, *Married Women*, § 603, note 4, where all the authorities are collected.

† *Gleaves v. Paine*, 1 De G. J. & S., ch. 87; *Gahn v. Niemcewicz*, 11 Wend., 312; 1 Bishop, *L. M. W.*, § 604; *Newhart v. Peters*, 80 N. C., 166; *Shinn v. Smith*, 79 N. C., 310; *Jeffrees v. Green*, 79 N. C., 330.

of her property altogether, and disabling her from reserving an equity of redemption for her own benefit."

Of course, the deed of mortgage must be executed, proved, and registered as required by law. In this case, it was not the giving of the bond which rendered the land liable; the bond itself was void as to the *feme covert*, and would have been if the husband had joined in the bond;* but the lands of the *feme covert* were charged with the debt in the mortgage deed, in which the husband joined. By virtue of the marriage, the wife's power to make a contract was suspended, and she could not sign a note so as to bind her estate. The husband was bound to support the wife. But we will see, when we come to treat of the wife's separate estate, that she could charge the same with debts in a certain manner, but neither with the separate estate was she bound to support her husband or her children.

The Wife's Right to Convert her Real Estate into Personalty.—

The right of the wife to convert her real estate into personalty, and that by virtue of a contract with her husband, seems to imply the power to contract with the husband, and therefore a kind of exception to the general incapacity to contract. Previous to any statutory regulations on the subject, if the wife voluntarily parts with her land, and permits the cash proceeds to go into the hands of her husband, without any particular agreement, he holds the same as absolutely as he does other personal effects which come to his possession during coverture.†

It is always competent for her, in a case of a conversion by the consent of the husband, to vest the proceeds in a trustee for her use, and thereby prevent the marital right of the husband.

Under the idea of conversion by consent without any agreement in favor of the wife, it has been held in Wisconsin, and perhaps in Iowa, that where the wife sold her dower in lands of her first husband, and put the money in bond secured by mortgage payable to herself, and then died, the husband surviving could hold the funds against her heirs.‡

* Schouler's Domestic Relations, 75; Mason v. Morgan, 2 Ad. & El., 30; Goulding v. Davidson, 28 Barb., 438.

† Chester v. Greer, 5 Hump., 26; Mahoney v. Bland, 14 Ind., 176; Bishop, Law Married Women, § 605, and notes.

‡ Ellsworth v. Hinds, 5 Wis., 613; Pursley v. Hays, 22 Iowa, 11.

This power of the wife to convey by deed with the consent of the husband, says Mr. Bishop, "carries with it to her by necessary implication the collateral power to give direction to the fund received in consideration of the conveyance."

If the proceeds of the land come to the hands of the husband impressed with a contract to compensate her therefor, such, for instance, as an agreement to purchase other lands for her, a court of equity will enforce the same, and charge the husband as trustee for the wife.*

These transactions between husband and wife, in which her real estate is converted into personalty and the proceeds allowed to go into the possession of the husband, will be carefully scrutinized by a court of equity, for the position and influence of the husband is such that very often her lands in this way may become a loss to her, and the law which protects the wife from undue influence, be defeated.

Chief Justice Ruffin, of the North Carolina Supreme Court, in the case of *Temple v. Williams*,† uses the following pointed language: "It is true that a husband and wife may in equity deal with each other in respect to her inheritance. But it is extremely difficult to do so with any security to her, without the intervention of a third person as trustee; because it is hard to tell, in many cases, whether she means to stand upon her separate rights or to surrender them to him; and therefore the clearest proof is requisite to rebut the presumption, when she and her husband turn her land into money, and she does not place her part of the money with some indifferent person for her, and as her separate property, but suffers the whole to be paid to the husband, that it was paid to and accepted by the husband for himself, and not in trust for his wife."

Perhaps, a court of equity should treat a transaction of this kind between husband and wife like the dealings between other confidential relations, such as trustee and beneficiary, mortgagor and mortgagee, in which the dealings are always the subject of the strict scrutiny of the court of equity. When we come to speak of the wife's separate estate, much more will be said in re-

* *Young v. Dula*, 70 N. C., 450; *Huntly v. Huntly*, 8 Ire. Eq., 250; 1 Bishop, *Married Women*, §§ 716, 717, 718.

† *Temple v. Williams*, 4 Ire. Eq., 39.

gard to the dealings between husband and wife in matters affecting real property.

The Conversion of the Wife's Realty by Operation of Law Considered.—It often happens that the wife's lands are converted into money by operation of law ; for instance, where land is sold by the order of the court for partition. Now, in this case there is no *contract* between husband and wife respecting the proceeds of the sale, and the *law* fixes the money with the character of *realty* for the purposes of the rights of *feme covert*, and, being treated as *land*, it will not be paid to the husband, except by her consent on a privy examination. Should the wife die after the land is thus converted, the husband is not entitled to her share of the proceeds as against her heirs. Should the fund pass to the husband improvidently, the wife not giving the consent required in the transfer of land by her, he will during his life, and his estate after death, be liable for the same.*

If the wife is an infant when the real estate is sold under a decree, the money will not be paid to the husband, although on the joint application of both, while her infancy continues. Similar results may follow in the case of the joint conveyance by the husband and wife of her lands, and the money not being paid, or note taken for the same, the law would raise the promise out of the transaction to husband and wife, and, in the absence of a contract, the proceeds of the wife's interest would be treated as realty. If the husband die before the money is collected, the right to recover survives to the wife. Perhaps, on this promise, thus raised by the law, the husband could sue alone, or join his wife at his election. In any event, the money which is the proceeds of the wife's inheritance (it being the consideration), should belong to the wife, and be equally protected in the courts, as if the land had remained hers. This is certainly so under the recent statutes giving the wife a statutory separate estate in all her property.

If money is given to the wife, with the express direction of the donor that the same shall be vested in lands, a court of equity

* *Ellsworth v. Cook*, 8 Paige, 643 ; *Bryan v. Bryan*, 1 Dev. Eq., 47 ; *Ex parte Hughes*, 1 Dev. Eq., 118 ; *Jones v. Edwards*, 8 Jones (N. C.), 336 ; 3 Ire. Eq., 88 ; *Pitts v. Wicker*, 3 Hill (S. C.), 197 ; *Knight v. Whitehead*, 26 Miss., 245 ; *Lancaster County Bank v. Stauffer*, 10 Barr, 398 ; 1 Bishop on Law of Married Women, and notes, §§ 607, 608.

treats the money as land, and, therefore, in legal effect, the wife's land. And, likewise, if land is directed to be converted into money, the court of equity treats the land thus impressed with the *donor's will* as money. Let it not be forgotten that these results flow from the power which the donor has to give direction to the fund, and to *impress* the property by his *will*.

If the conversion of the real estate into personalty be by will, as in the case of executors being empowered by will to sell real estate for certain purposes, such as the payment of debts or raising portions, and the sale is made, but a surplus remains undisposed of, whether that is occasioned by the silence of the testator, or by lapse, or other cause of inefficiency in the will, the heir at law takes the residue as he would take real estate.*

It is held, also, that the surplus money on a sale of land on a decree of foreclosure is treated as land in behalf of those having a lien upon the land or a vested right therein; that the widow of the mortgagor is entitled to dower in the surplus as she was in the land before the decree of sale.†

Equitable Conversion.—What is here said is embodied in the doctrine of *equitable conversion*, of which Mr. Adams says, “this doctrine is embodied in the maxim that ‘what ought to be done is considered in equity as done’ and its meaning is that, whenever the holder of property is subject to an equity in respect to it, the court will, as between the parties to the equity, treat the subject-matter as if the equity had been worked out, and as impressed with the character which it would then have borne.”‡

Of course, this doctrine does not apply alone to married women, as it may affect all parties to a *trust* or *contract*, in reference to real property especially. This constructive change of real property into personalty, and *vice versa*, introduces always new laws of devolution and transfer. If a *trust*, in favor of a *feme covert* or any other person, distinctly and imperatively requires money to be vested in lands, the funds, during the continuance of the trust and for the objects of the same, will be treated as though

* Bishop on Law of Married Women, § 618; *Rives v. Dudley*, 3 Jones Eq., 126.

† *Matthews v. Durgess*, 45 Barb., 69; *Adams's Equity*, 139 (notes); 1 Jarman on Wills, chap. 19.

‡ *Adams's Eq.*, 135.

the purchase had actually been made, and, of course, the opposite proposition results that, if land is directed to be converted into personalty, the sale is treated as made. In the one instance, in the case of the wife, all her rights as to real property have effect; in the other, the husband's rights to the personalty will attach, if reduced to his possession.*

It may be observed that, if the trust is not imperative, and the trustee or holder of the fund has a *discretion*, there is no conversion in law until the directions are *actually* performed; then the exercise of the power may depend upon a condition, as the consent of the parties in interest. If the trust is imperative, the discretion, merely as to *time*, will not affect this constructive change of the property.

This conversion originating in the duty of the trustee or the holder of the property, of course this converted character remains impressed on the property during the existence of the trust. The trust may be countermanded, either by the revoking power in the donor (if such exist), or by the act of the party in whom the absolute dominion has vested, and it follows in that event that the conversion is determined. The *subsequent* owners of the property may, by some unequivocal act, countermand the trust, and this is denominated by Mr. Adams a *reconversion*. This purpose to deal with the property in its original, instead of its converted character, may be gathered from all the circumstances and the conduct of the parties. If land is directed to be sold, and the parties enter and demise the same, this act would be sufficient evidence of that intention.

Mr. Adams further says on this subject: "The general principle is, that the conversion is limited to the purposes of the donor, and that, therefore, in the event of failure, the property will devolve according to its original character." For example, he says, "If land be devised for sale with a direction to apply the produce for purposes altogether illegal, or which altogether fail, the heir-at-law is entitled."

Then this equitable conversion arises often out of *contract*. This may be illustrated by the statement, that if a contract be made for the sale of lands of a binding nature, enforceable in

* On this general doctrine, see Adams's Equity, and elaborate note, 136; *Fletcher v. Ashburner*. 1 L. Cases Eq., 563 (first American edition).

equity, such contract, though executory, is considered as performed; the effect of which is, the land becomes, in equity, the property of the vendee, and the consideration-money the property of the vendor. The vendee is entitled to the rents and must bear the loss, while the vendor is entitled to interest on the unpaid purchase-money.

On this principle, if the vendee die, the land will pass to the devisee or heir, who will be entitled to have the price paid out of the personalty, and on the death of the vendor it will pass to the executor, for whom the devisee or heir will be a trustee.* On this interesting question Judge Story says: "But these general principles are not without limitations and qualifications, standing upon peculiar reasons, but still consistent with those principles. Thus, nothing is looked upon, in equity, as done but what ought to be done, not what might have been done. Nor will equity consider things as thus done in favor of everybody, but only in favor of those who have a right to pray that they might be done."† It follows that this conversion could not result in favor of or against a person not a party to the contract, and only to those objects strictly within the scope of the contract.

It is upon this principle that, where a statute authorizes the sale under execution of a pure and unmixed trust, if the vendee, holding under a valid written contract to convey, and having paid the purchase-money, the property is sold under an execution for the debt of the vendee, the purchaser can go into equity and enforce specific performance from the vendor. This equitable title draws to it the legal title. The court treats that "which ought to be done as already done," and therefore as though the vendor had actually made a conveyance to the vendee on payment of the purchase-money.‡

Property subject to a Trust, unduly Changed.—On a principle analogous to that of the equitable conversion, it is held that where property subject to a trust has been unduly changed for other property, the substituted property is bound and impressed with the incidents and character of that which it represents; as, for

* Adams Eq., 141. See Story Eq. Jur., § 790, and the note, which refers to a large number of English authorities. Craig v. Leslie, 3 Wheat. Rep., 577.

† Story Eq., § 792.

‡ Phillips v. Davis, 69 N. C., 117; Wilcox v. Calaway, 67 N. C., 463.

instance, "if the guardian or trustee of an infant invest the personal estate in land without authority for so doing, the land will be affected in equity as personal estate, and will pass to the administrator on the infant's death."* "And if timber be cut by a guardian or trustee on the estate of an infant tenant in fee, the proceeds will be realty and go to the heir."

Where the Estate or Fund has been changed by Breach of Trust.

—If a trustee commit a *breach* of his trust, and change or convert the trust property into other property, the *cestui que trust* can, at his option, attach and follow the property in its altered form. Of course it must appear unequivocally that the one property was produced by the other. This is similar to the doctrine of a resultant trust, which is simply a man paying for an estate with the funds of another, which is conveyed to himself, he holds it in trust for the party who owned the consideration-money. A trust of this kind need not be evidenced in writing, although the claim is for real estate. The application of the trust fund should be proven, however, by convincing evidence, such as the admission in the answer. Mr. Adams, in speaking of this principle and of the mode of fixing a trust of this kind, says: "Unless there be corroborating circumstances, such as a written account by the trustee showing how the money was used, or a clear inability in him to make the purchase with other funds, mere parol evidence of declarations, supposed to be made by him, will be received with great caution."†

In the case of *Gidney, admr., v. Moore*,‡ it appeared that while domiciled in Alabama, in 1862, the father of Mrs. Moore gave to her a sum of money (while she was a *feme covert*) which, by the law of Alabama, became the separate property of the wife, and the husband the trustee for her; they moved to North Carolina, and, by a contract with the wife, Moore agreed to invest the same in a tract of land known as the "Wilson tract." The husband was a merchant, and mixed the funds with his own. He did purchase the "Wilson tract" and pay for the same, and went into possession; the husband died insolvent, and in a contest with the administrator, who sought to subject the same to the

* Adams Eq., 142.

† Adams Eq., 144.

‡ *Gidney, admr., v. Moore*, 86 N. C., 484; *Shields v. Whitaker*, 82 N. C., 516.

payment of the husband's debts, the widow established a trust by showing that the land was paid for with her money, and to prove this the declarations of the husband while in possession of the land were held admissible to prove the use of the wife's money in payment of the "Wilson tract." It was also held in this case that, although by the law in North Carolina, in 1862, the money when reduced to possession of the husband, the marital right attached, but, as the gift was made in Alabama, the legal status of the property was fixed by the law of that State, notwithstanding its removal to North Carolina.*

This was not a case of breach of trust exactly, as the wife had consented for the funds to be invested in the land, but the declarations of the trustee would have been competent evidence in that case.

THE WIFE'S SEPARATE ESTATE.

What is the Wife's Separate Estate?—"The separate estate of a married woman is that which belongs to her, and over which her husband has no right in equity. It may consist of lands or chattels."†

On approaching this subject, Mr. Schouler, in his recent work on the *Domestic Relations*, says: "Emerging from coverture and the common law, we come out into the light of equity, and here all things assume a new aspect. The married woman is no longer buried under legal fictions. She ceases to hold the strange position of being without an existence, one whose identity is suspended or sunk in the status of her husband; she becomes a distinct person, with her own property and liabilities."‡

He further says, speaking of this peculiar position of the wife: "She may contract on her own behalf; she may sue and be sued in her own name; she may hold lands, goods, and chattels in her own right, and this property is known as the wife's separate estate, or estate limited to her separate use." And Mr. Bishop, in his recent work on the *Law of Married Women*,§ says: "The courts of common law take cognizance of the *legal* title to property, and do not generally recognize an *equitable* ownership as

* On this point, see *Hicks v. Skinner*, 71 N. C., 539; *Adams v. Hays*, 2 Ire., 361.

† 2 Bouv. L. Dic., 513.

‡ Schouler's *Domestic Relations*, 187, ch. 10.

§ 1 Bishop *Law of Married Women*, §§ 792, 794.

distinct from the *legal*." "If A. is the legal owner of property, a suit by A. concerning it may be maintained in the courts of common law, without reference to the question whether, in equity phrase, his conscience is not charged with a trust as respects this property. If it is, the equity courts will take such collateral jurisdiction of the case as shall insure the performance of the trust, not by way of denying or setting aside the principles of the common law respecting this property, but by seeing that, while the *legal* right is preserved, the *equitable* right is preserved also."* It will be perceived by the reader that the doctrine of the wife's *separate estate* is the creature of a court of equity, and is involved in the broad and expansive doctrine of *trusts*. As was said in a Pennsylvania case, in speaking of *separate estate*, "That expression always refers to an equitable estate held by somebody in trust for a married woman."†

The donor of a separate estate most usually grants the property to a trustee named, who holds the same in trust for the wife; but if the property is given to the *feme sole*, or she holds it when married without the intervention of a trustee by name, the court generally holds the husband charged as her trustee. This property is quite different from the wife's sole estate, which we have been considering in a former part of this chapter, in which the marital rights attach and curtesy results.

This sole property, not impressed with a general or special trust, is subject to the legal rules and incidents as administered in the common-law courts, while the *separate estate* is controlled by the rules, usages, and great principles of the court of equity, it being always affected with a *trust*, the administration of which belongs peculiarly to courts of equitable jurisdiction.

Separate Estate—How created.—This estate is most usually created—

1. By deed.
2. Devise.
3. A marriage settlement.

These instruments usually vest the *legal* estate in some third person, the wife being the *cestui que trust*. It is said sometimes that the wife's control over this property is in the nature of a

* 2 Story Eq. Jur., § 960 *et seq.*; *Shelton v. Shelton*, 5 Jones (N. C.).

† Todd's Appeal, 12 Harris (Penn.), 429.

power of appointment. Now it may be observed, in regard to a trust, that the deed or instrument under which the trustee holds the property may constitute special obligations. It may point out what are the powers of the trustee, and what the powers of the beneficiary; or it may specify them in part, leaving some questions to be settled by the law. If a trust be binding in general, it is equally so in its details. The person creating the trust can vest the wife with much or little power, according to his views of what is best for her interest. In this way her capacity to alienate is frequently limited, if not destroyed, while the only mode of charging the estate is pointed out in the instrument.

These instruments, therefore, create the relation of *trustee* and *cestui que trust*, the duties of which will not be mentioned here in detail, except to say that this trustee cannot avail himself of the ownership of the same to his personal benefit in opposition to the rights of the *cestui que trust*, the wife. The trust property cannot be subjected to the debts of the trustee, although he be the husband. Under some circumstances the trustee may convey the trust property for valuable consideration to a party who has no notice of the trust, yet the trustee would be liable to the wife. And in those cases where no trustee is appointed, and the conveyance is simply to her separate use, and the husband gets control of the same, the wife has the same remedies in a court of equity against him that she would have against a stranger for a breach of trust.* It is the privilege of the trustee to go into a court of law for her protection, either to bring suits or defend in his own name. In regard to the liability of the husband as trustee Mr. Bishop (*Law of Married Women*) says: "There are cases in the books from which the inference might be drawn that the husband, when a trustee, could not be held so strictly as a third person.† But there is no such doctrine generally maintained."‡

It is better sometimes that a third person should be made the trustee rather than the husband.

As a matter of course, if the wife's rights depend upon a writ-

* Pike v. Collins, 33 Me., 38; Whitman v. Abernath, 33 Ala., 154; Freeman v. Freeman, 9 Miss., 763; Bridges v. Wood, 4 Dana, 610; Croom v. Wright, 4 Ire. Eq., 248; 1 Bishop, Married Women, § 800 (note 4).

† Bayton v. Cummings, 16 Ga., 102.

‡ Bishop, Law of Married Women, § 803.

ten instrument—either a deed, devise, or marriage settlement—the *construction* and *meaning* of those instruments are questions for the courts. And as to all the rules of evidence and rules of construction, by which written documents are construed, the practitioner is supposed to consult the authorities on *evidence*. The space allotted to this treatise will only allow a reference to a few of the *leading* questions which most frequently arise.

What Words sufficient to Create the Separate Estate.—It is not expected to have perfect uniformity in the decisions of courts relating to the meaning and force of words, different judges being surrounded by different influences, and each accustomed to different habits of thought; and some of the cases arising under special legislation, in which the principles of the unwritten law are made to adapt themselves to the actual or supposed legislative intention. Then, again, the lapse of time and the change in the progress of a people have much to do with moulding judicial opinion, and especially judicial dicta. While war, mutations in political power, and even partisan zeal, have had their influence in piling up volumes of decisions and *obiter dicta*, until it is important for the practitioner to be the more vigilant in discovering the *true principles* of the unwritten law.

Yet, it may be asserted that as to what words will create, a trust in favor of the wife or the separate estate, there is a substantial uniformity of opinion. If property be conveyed to a married woman or to trustees for her use, the presumption is that she takes subject to the laws of the land, and liable to such marital rights as the law recognizes,* and to rebut this presumption, and create a trust for the wife or separate estate, the intention to do so must clearly and affirmatively appear upon inspection and consideration of the entire paper-writing. In the case of *Rudisell v. Watson*,† *Ruffin*, C. J., of North Carolina, says: "The court does not gather that intention by measuring costs, but only sustains it when it is unequivocal and expressed in unambiguous terms. The words '*separate use*' are appropriate to this purpose. Any others may have the same effect." Perhaps, this idea of the intent being made to affirmatively appear is a little strong. Other

* Bishop on Law of Married Women, § 824, and authorities cited in note 3.

† *Rudisell v. Watson*, 2 Dev. Eq., 430; *Meredith v. Owen*, 4 Sneed. (Tenn.), 223. See cases collated 1 Bishop on Law of Married Women, § 839, note 2.

courts say the wife takes a separate estate, if the *purpose* of the donor is *sufficiently manifest*.

No technical language is necessary, but it should appear unequivocally from the face of the writing that the husband's rights are excluded,* leaving nothing to mere inference; and, generally, in both the English and German cases, it is held that no particular form of words is necessary. The following expressions are sufficient to create a trust in favor of the wife: "to the wife's sole and separate use and benefit," or, "her own sole use and benefit," "to the use and benefit," "for the entire use, benefit and profit, and advantage."† In South Carolina, the words "use of his wife" are held insufficient.‡

The words "sole and separate use" are most commonly applied, and appear to be the most precise, comprehensive, and apt expressions to exclude the marital right.

The following expressions have been held *not* sufficient to create a trust for the wife, and to exclude the marital right: "for the joint use of husband and wife," "the gift not to extend to any other person," "all to be for her and her heirs' proper use," "for her use, benefit and behoof," or "in trust for the use" of the *feme*, "to her and the heirs of her body, and to them alone," "to her use and benefit."§ The mere intervention of a trustee will not create a separate trust. A direct gift to a married woman does not create a separate estate. There is some diversity of opinion as to the expression or stipulation in the instrument that the property shall not be liable to the husband's debts.

The weight of authority is in support of, the view that this stipulation creates a separate estate.|| The mere fact of vesting the estate in a trustee does not create a trust in favor of the wife as against the marital right.¶

* *Brown v. Alden*, 14 B. Mon. (Ky.), 141; *Moss v. McCall*, 12 Ala., 630; *Graham v. Graham*, *Riley*, 142. See *Bell on Husband and Wife*, 475-483; *Hill on Trustees*, 420, note 2.

† *Steel v. Steel*, 1 Ire. Eq., 452; *Good v. Harris*, 2 Ire. Eq., 630; *Heathman v. Hall*, 3 Ire. Eq., 414; *Schouler's Domestic Relations*, 202, and notes.

‡ *Tennant v. Storey*, 1 Rich. Eq., 222.

§ *Bender v. Reynolds*, 12 Ala., 446; *Ashcraft v. Little*, 4 Ire. Eq., 236; *Rudisell v. Watson*, 2 Dev. Eq., 236; *Houston v. Embry*, 1 Sneed., 480; *Hill on Trustees*, 420.

|| *Hill on Trustees*, 420, note 2.

¶ *Welch v. Welch*, 14 Ala., 76.

A trust for a woman's separate estate may take effect, although she is unmarried at the time, and no particular marriage is in contemplation; if she marry at any time afterwards, the trust attaches to the property. This doctrine has been subject to division of opinion in England, but now is settled as here stated.*

The Power of the Wife over her Separate Estate, and the Modes of Charging it with Debts.—The most difficult questions which arise in regard to the separate estate are those affecting the power of disposition of the same, and to what extent, under what contract and circumstances the same is charged with the debts of the wife.

Says Mr. Adams:† “The effect of the separate use-trust is to enable a married woman, in direct contravention of the principles of law, to acquire property independently of her husband, and to enter into contracts, and incur liabilities in reference to such property, and dispose of it as a *feme sole*, notwithstanding her coverture and disability at law.” This was the earlier English doctrine; but there, as well as in many of the States, reasons have been found for limiting this almost complete power over the separate estate.

Under this doctrine of the English Court of Chancery it was found that the influence of the husband over the wife was often sufficient to induce the ready alienation of this separate property, and, therefore, the trust in practice became nugatory, and the wife was liable to lose the benefit intended by the gift or settlement. It was, therefore, allowed to infringe on the principles of the common law, by allowing the gift of the separate estate to be fettered and qualified by prohibiting anticipation or alienation.‡ Under this doctrine, if the instrument under which the *feme* claimed limited the power of alienation, she was bound by it. This restraint was only valid during coverture, and immediately on discovery the restraint was nugatory. But it was held that, if no alienation took place during discovery, the prohibi-

* Hill on Trustees, 419, where the English authorities are cited.

† Adams's Equity, 48. See 2 Kent Com., 162, and notes.

Gifts from the husband to the wife may be supported as her separate estate, if not made in fraud of creditors, even without a trustee.

‡ Adams's Equity, 44.

tion will attach on the second marriage. On this latter doctrine, the American authorities are not uniform. In Tennessee, Alabama, Georgia, Maryland and others, the English doctrine has been adopted.* In other States, the clause against alienation was held valid only where there was an existing coverture, and void as regards a subsequent one.†

In the early case of *Hulme v. Tenant*,‡ Lord Thurlow announced the doctrine that in equity the *feme covert* is competent to act as a *feme sole*, as to her separate estate, unless restrained by the instrument creating the separate estate. Under this doctrine it was held that her general personal engagements should be executed out of her separate estate. That is to say, under this doctrine, the wife, having a separate estate, and making general debts and engagements, was liable on the same, without any contract in reference to the separate estate. It was *presumed* that she contracted with reference to her separate property. This doctrine was the subject of judicial contest in England for more than half a century.

On this point and others relative to the "Separate Estate," attention is called to an able article in the July No., 1874, of the *Southern Law Review*, written by Edmond S. Mallory, Esq., of Jackson, Tenn.

THE SEPARATE ESTATE.

A long series of discordant and confused decisions by the Supreme Court of Tennessee recently culminated in a direct conflict of opinion between the present court and its immediate predecessor as to the power of a married woman over her separate estate.

The numerous conveyances of late years settling property to the separate use of the wife, free from the debts, contracts, and control of the husband, and the many transactions thereunder, have opened a fruitful field for litigation unless something is done to attain uniformity of decision.

A reference to the decisions of other States will also show that, with very few exceptions, the question is a vexed one. Eminent judges, after most elaborate reviews, have arrived at directly opposite conclusions. There seems to be no way out of this labyrinth of difficulties, except by adopting and pursuing to its logical conclusion one of the two principles much discussed in connection with this subject. The endeavor will be made to show that unless

* *Beaufort v. Collier*, 6 Hump., 487; *Fellows v. Tann*, 9 Ala.; *Fears v. Brooks*, 12 Geo., 197; *Waters v. Tagwell*, 9 Md., 291.

† *Kuhn v. Newman*, 26 Penn. St., 227; *Dick v. Pickford*, 1 Dev. & B. Eq., 480.

‡ 1 Brown, C. C., 16

this is done, there is no prospect of obtaining any satisfactory solution of the questions constantly arising, not only as to the power of the wife to convey or charge her separate estate by proper instrument, but especially as to its liability for her general contracts. For convenience, the two principles will be alluded to as the first and second.

So early in the history of the separate estate as the case of *Hulme v. Tenant*, 1 Brown, C. C., 16, the first principle was adopted to its full extent, and, if this case had been unhesitatingly followed, there is good reason to believe that the subject would have been stripped of its perplexities and rendered comparatively simple. In this case Lord Thurlow enunciated the principle that in equity, as to her separate estate, a *feme covert* is competent to act in all respects as a *feme sole*, unless specially restrained by the instrument of settlement, and accordingly he held that her general personal engagements should be executed out of her separate estate. The rule which had been laid down in *Peacock v. Monk*, 2 Vesey, 190, by Lord Hardwicke, that a *feme covert*, acting with respect to her separate estate, is competent to act in all respects as a *feme sole*, was extended to its extreme limit by holding her separate property liable for her engagements in no manner relating to or respecting it.

The legislature of Tennessee has by a recent act* virtually adopted this principle, though the peculiar nature of the act may lead to some doubt as to the application of the principle to all classes of cases; but, however this may be, an opportunity is afforded the chancery courts of this State, by the legislative change of the principle of decision heretofore adopted by them, to rid the subject of most of its former difficulties. The act will be noticed more particularly in conclusion.

But this doctrine of Lord Thurlow was not received in England without a struggle, which is almost without parallel in the judicial history of that country. For more than half a century *Hulme v. Tenant* was debated and doubted, combated, and reluctantly followed by successive lord chancellors, though it is believed it was never directly overruled, and it was not until the case of *Murray v. Barlee*, 3 Mylne & Keene, 209, that its authority was fully recognized. Without doing more than referring to the reluctance of Lord Thurlow himself to enforce the result of this doctrine in subsequent cases,† the restraining views of Lord Rosslyn and Lord Alvanley, M. R.,‡ the distinctions of Lord Loughborough between the express and implied contracts of the wife,§ and the doubts and distractions of Lord Eldon,|| it is sufficient to say that the rule in *Hulme v. Tenant* was fully recognized by Lord Brougham in *Murray v. Barlee*, *supra*, and confirmed by Lord Cottenham in *Owen v. Dickenson*, Cr. and Ph., 53, though the doctrine of *Mrs. Matthewman's case*, L. R., 3 Eq., 781, and other later cases, seems to require that the contract should be upon the credit of the separate estate, so intended by the *feme*, and so understood by the person with

* Act of 1869-70, chap. 99.

† *Ellis v. Atkinson*, 3 Bro. C. C., 347, etc.

‡ *Whistler v. Newman*, 4 Vesey, 129; *Mores v. Hinsh*, 5 Vesey, 692; *Hyde v. Price*, 3 Vesey, 437; *Socket v. Wray*, 4 Bro. C. C., 484.

§ *Bolton v. Williams*, 2 Vesey Jr., 238.

|| *Jones v. Harris*, 9 Vesey, 497; *Parker v. White*, 11 Vesey, 209, etc.

whom she is dealing.* While this requirement is not entirely consistent with the reasoning in *Murray v. Barlee*, and *Owen v. Dickenson*, nor, indeed, with the logical result of the broad principle laid down, and so calculated to open the door for litigation, yet it is perhaps a just limitation of the liability of the wife. With this qualification, then, the English doctrine may be thus stated: The wife, as to her separate estate, is competent to act in all respects as a single woman, unless specially restrained, but, for the protection of the wife, the court will require that the contract be made upon the credit of the estate, so intended by her, and so understood by the party with whom she deals.

It is very certain that without the qualification or limitation arbitrarily imposed by the court, and even with it, no question of more than ordinary difficulty is likely to arise; she is competent to act. Has she acted upon the credit of the estate? If yes, then her estate is bound, whether the contract is for building her a house or a pleasure-boat, or for necessities or luxuries. Whatever may be the demerits of this principle, it certainly has the merit of being simple. Whether or not the limitation should be added is a question of policy,—the principle should not be affected by it. A reference to the English cases cited will show that the debate has been more about the authority and propriety of the principle than its logical consequence. If there are any special restrictions in the settlement, still the principle is not affected. The ordinary rules of construction are applied to the restrictions, and if the act sought to be authorized, or the liability sought to be enforced, falls within the restrictions, neither can be maintained.

But there is a second principle diametrically opposed to the above, which, if adopted and pursued to its logical conclusion, will also relieve the subject of its perplexities, viz.: That a married woman, even in equity, is to be viewed as a *feme covert*, with all the disabilities attaching to her condition at law, possessing no powers and subject to no liabilities except those derived from, or created in, pursuance of the instrument of settlement; that in acting she exercises a delegated power solely, and must pursue it, and all charges against her estate must be under and by virtue of the power solely.

It is not necessary to discuss the merits of either of these principles as opposed to the other. I have not the ability to do it satisfactorily, and will only attempt to show that the adoption and full development of one or the other is necessary to the attainment of uniformity of decision on any settlement of the questions arising on the subject, and that the failure to adopt either, or carry it out when adopted, has brought about all the perplexities. This can best be done by looking at the result in England, as stated above, and by a reference to a few of the many hundreds of American cases.

The first which will be noticed is the oft-quoted one of *Methodist Episcopal Church v. Jacques*, 3 Johnson Ch. R., 77, 120, in which the principal English cases to that time were elaborately reviewed and criticised by Chancellor Kent. Notwithstanding his decision was reversed in the Court of Appeals by the unanimous opinion of the judges, the learned Chancellor's opinion has had a controlling influence in many of the States, and, with great deference, I really

* See *Shattock v. Shattock*, L. R., 2 Eq., 182; 35 L. J. Ch., 509; *Johnson v. Gallagher*, 3 D. F. and J., 404; 7 Jurist, N. S., 373; *Picard v. Hine*, L. R., 5 Ch. App., 274, cited in *Benjamin on Sales*, 2d ed., 31.

believe has added much to the confusion on the subject. There was no restraining clause in the settlement in that case, but simply a prescribed mode of disposition. According to the first of the principles above stated the power of the wife should not have been affected by this clause; according to the second, she was, of course, confined to it.

He prefaces his review with the statement that he is very unwilling to admit that, notwithstanding the cautious language of the settlement, the wife was to be deemed to have absolute dominion over the property as a *feme sole*, and not bound by the prescribed form of disposition. "Justice and good faith," continues he, "require that the wife should not lose, nor the husband acquire, that separate use of the property unless in the mode prescribed. These interests, which married women are permitted to take for their separate use, are creatures of equity, and equity may modify the power of alienation according to the intention of the settlement, which is to secure ~~some~~ separate and certain provision for the wife, free from the control of the husband, and not to be parted with except in the mode and under the checks prescribed. If the technical rule of law, that when a person is owner of property he takes it with all its incidents, and that every restraint on alienation is repugnant to the ownership, be applied to these settlements, they may be abandoned at once as delusive, for the most guarded proviso against alienation would be void. But I am not able to perceive any objection to a fair construction of these instruments, nor to a decided support of them according to their object and intention, without suffering ourselves to be embarrassed by such technical rules. I wish that I felt myself more at liberty than I do to pursue this course, for the weight of authority seems to impede it; yet I apprehend the cases are too unsettled and contradictory to afford any certain conclusion on the point. They are certainly in favor of the position that a married woman is considered in equity as a *feme sole*, and is held to have an absolute dominion or power of disposition over it, unless her power of disposition be restrained by the deed or will under which she became entitled to it. The next question then is, when does the deed restrain her? I think she is to be deemed restrained in the present case to the modes of disposition mentioned, and that her husband cannot set up any other less solemn alienation against her. Here also the weight of book-authority, and especially of the writers who have treated on this branch of the law, is against this conclusion; they seem to hold that there must be an express restriction upon alienation, either absolutely or by some other mode than the one mentioned, or the wife will not be bound. But if the intention be equally clear and certain in the instrument in question, why should more explicit language be required? The intention evidently was in this, as it is in most other cases of property settled to a married woman's separate use, that the interest should be inalienable, except in the mode provided. Then why should not the court give effect to that intention? There is no sufficiently uniform and untroubled current of authority to prevent it."

This reasoning is strong, and it has had its influence. But it should lose much of its force when it is borne in mind that provisos against alienation, except in the mode prescribed, are not void when introduced into a settlement to the separate use. They are repugnant, it is true, to the technical rules of law, but, as by a violation of these rules the separate estate itself was created or acknowledged, so by a further violation these restraining clauses, or clauses

against anticipation as they are usually called, have been sustained. And these settlements as drawn in England, even since the absolute power of the wife has been sustained beyond dispute for the last fifty years, are anything but delusive. Allowing the *a priori* power, as it may be styled, of the wife, a settlement properly executed with the view of depriving her of this power will as completely disable her as if the contrary or second principle had been adopted.

Waiving any discussion of the justice and good faith of allowing the wife to dispose of the estate in any other than the prescribed mode, the legal construction, based upon the inherent power of the wife, most certainly allowed her to dispose of it as she pleased, there being no restraining clause in the settlement. Hence it was that Chancellor Kent was led to deny the first of the above principles, that the wife should be considered in all respects as a *feme sole* with power to do as she pleased, and to seek authority for the position that she should be considered a *feme sole* ~~modo~~ *modo*, a sort of mean between a *feme sole* absolute and a *feme covert*. It is ~~true~~, he says in conclusion, that instead of maintaining that she has an absolute power of disposition, unless specially restrained by the instrument, the converse of the proposition would be more correct, that she has no power except what is specially given her, and to be exercised only in the mode prescribed, if any such there be; that her incapacity is general, and the exception is to be taken strictly, and to be shown in every case, because it is against the general policy and immemorial doctrine of the law.

Now, if he had been bold enough to have disregarded the English cases altogether, and decided the case upon this view, which is none other than the second principle stated above, no objection could have been made except that it was directly contrary to the English rule. Clearly he does not decide the case upon this principle, but upon the supposed intention of the settler. He admits, hesitatingly, it is true, that if the instrument is silent as to the mode of disposition, it should be left at large from the presumed intention of the settler not to restrain it. This is incompatible with the position that she has no power except what is specially given, and to be exercised only in the mode prescribed, and that her incapacity is general, etc., and confusion must follow unless one position or the other is absolutely rejected. This rule of the intention governing each case, regardless of principle, the Chancellor himself confesses, at page 108, is open to great objections. He says, that the cases make distinctions on this point too refined to be useful and so subtle as to be dangerous, quoting Mr. Sugden as complaining of this subtlety, and saying that it is almost impossible for a practitioner to advise confidently on any case where the very words have not received a judicial construction.

The objection to Chancellor Kent's view is that nothing is decided upon principle. The woman is neither a *feme covert* nor a *feme sole*. No rule beyond the supposed intention of the settler is laid down, and this intention is to be collected from all the facts and circumstances of each case. Every settlement, unless the very words of it have been passed upon, is likely to become the subject of a lawsuit.

If the first principle is adopted, the legal construction, I say, of a merely prescribing clause would not deprive the wife of power. The prescribing clause suffices, when it is complied with, to make valid the conveyances and charges of the wife in a court of law, and to confer legal rights upon parties dealing with her; but it does not operate to deprive a court of equity of the power to

enforce any of her contracts respecting her separate estate fairly entered into. If the wife complies with a prescribing clause, neither the first principle nor the intention has any application; she simply exercises a power, and this a *feme covert* may do, whether the power is in gross appendant or simply collateral.* She is merely an instrument, and the appointee claims under the settlement.† As long as she pursues the mode prescribed, courts of equity have no special jurisdiction over her acts, except, perhaps, to aid a defective execution, etc.

The second principle is applicable in all its force when her acts are considered by a legal forum, and if valid there, they are, of course, valid in equity.

A prescribing settlement may well be likened to the Married Women's Acts of many of the States, prescribing the mode in which they shall dispose of or incur their separate estates. A brief consideration of the general effect of these is not out of place, for other obvious reasons as well. That a merely prescribing act does not exclude the jurisdiction of equity over the wife's contracts seems to be clear. In the case of *Love v. Watkins*, 40 Cal., 547, the court says: "The provisions of the act concerning (married women's) conveyances were not intended to interfere with or abridge the powers of a court of equity to compel the performance of contracts which are binding upon married women. . . . The object of requiring their contracts to be executed with certain formalities has often been held to be for her protection, and not to deprive her of any power over her separate estate. The statute concerning conveyances requires her to execute her conveyance in a certain mode, when the conveyance constitutes the evidence of the sale she has made; and the act concerning husband and wife requires the same formalities in any other contract affecting it. The object is to secure her perfect freedom of action, and to preserve the evidence of the fact." And, it may be added, to perfect the transaction, so as to give the person dealing with her rights which can be asserted at law.

So, in the case of *Phillips v. Graves*, 20 Ohio St., 371, where it was insisted that the acts concerning the rights and liabilities of married women prescribe the only rules in relation to their separate property, the court says: "We have carefully considered these propositions, and have come to the following conclusion, to wit: These statutes do not nor were they intended to abridge the powers or restrain or bind the jurisdiction of courts of equity in relation to the separate estates of married women; but, on the other hand, they do enlarge the jurisdiction of the chancellors, in so far as the general property of married women is changed, by force of these statutes, to separate property. The legislative intention was to change the *legal* status of married women, and to declare their 'legal rights and liabilities.' The common law, in so far as its rules are incompatible with the provisions of these enactments, is abrogated or modified. The remedies therein provided may be enforced by courts of common-law jurisdiction. And to the extent that courts of law are by these statutes invested with a remedial jurisdiction heretofore exercised by courts of equity exclusively, the remedies are cumulative and the jurisdiction concurrent."‡

* Sugden on Powers, 182; 4 Kent Com., 325.

† Watkins Conv., 271.

‡ Story's Eq. Jur., § 80; Mitchel v. Otey, 23 Miss., 236; Todd v. Lee, 15 Wis., 380; Yale v. Dederer, 18 N. Y., 265, are cited.

The views of Chancellor Kent have been followed in many of the States, including Tennessee, and the array of discordant cases is truly formidable; but before examining some of them, I will proceed with the principal New York cases.

The principle so distinctly announced by Ch. J. Spencer and Judge Platt, in overruling Chancellor Kent, has not been logically pursued in that State. In *North American Coal Company v. Dyett*, 7 Paige, 9, the Chancellor says: "The *feme covert* is, as to her separate estate, considered a *feme sole*; and may in person, or by her legally authorized agent, bind such separate estate with the payment of debts contracted for the benefit of that estate, or for her own benefit, upon the credit of the estate." Under the principle, even though the debts were not contracted for the benefit of the estate, or upon the faith of the estate, it should nevertheless be bound, if they were her debts fairly contracted. The qualification is agreeable to the later English cases cited from Benjamin on *Sales supra*, and perhaps is just, but one departure from principle generally begets another, as will be seen presently. This case seems to have been affirmed in the Court of Errors upon principle, Justice Cowen saying: "Where her separate estate is completely distinct, and, as here, independent of her husband, she seems to be regarded in equity, as respects her power to dispose of or charge it, to all intents and purposes as a *feme sole*, except so far as she may be expressly limited in her powers by the instrument under which she takes her interest."

But, in the case of *Yale v. Dederer*, 18 N. Y., 265, a step was taken which initiated confusion. In this case Mr. Dederer had bought a lot of cows of plaintiff, who refused to complete the sale unless Mrs. Dederer would join in the note for the purchase-money. This she did. Upon failing to make the money out of the husband, under execution, the plaintiff brought his action against the wife to charge her separate estate. The judge, at the special term, charged her estate with the payment, and this was affirmed at the general term, but reversed in the Court of Appeals by a divided court,—Judges Denio and Roosevelt dissenting, and Judge Strong, though present, not voting. Judge Comstock, delivering the opinion of the majority, reversed the judgment of the general term, on the ground that the mere signing of a note by a married woman, not in fact for the benefit of her estate, but as surety for another, and not declared in the note to be for her benefit, and where she had not professed in the contract to charge such estate, did not operate as a charge upon her estate. The principle here was evidently departed from. No process of reasoning can sustain this case under the principle which had been adopted.

The same case came shortly afterwards again before the Court of Appeals, 22 N. Y., 450; and it appeared from the findings, in addition to the facts developed on the former trial, "that Mrs. Dederer intended to charge, and did expressly charge, her separate estate for the payment of the note." The court held that, in order to charge the separate estate, the intent to do so must appear from the very contract, which is the foundation of the charge, or the consideration must have been obtained for the direct benefit of the estate itself. The decision in this case was at variance with the prior cases, and directly contrary to the English rule, which the court, in *M. E. Church v. Jacques*, in error, and *North American Coal Co. v. Dyett*, professed to follow. Upon what principle it is based is inconceivable, unless it be upon the idea of its operating as an appointment under a power delegated by the instrument; and this is in

consistent with the view of the married woman's power in equity maintained in the prior cases.

Mr. Schouller, writing of this case, says: "This late case is an important one, as establishing in a leading American State, under cover of legislative policy, a new doctrine, altogether at variance with that of the modern English equity courts, and so contrary to its own precedents, that in Wisconsin it has been unsparingly condemned."* Judge McIlvaine, in *Phillips v. Graves*, 20 Ohio St., 371, thus comments upon it: "This rule is in conflict with the English doctrine, as we have seen, and it is believed to be in conflict with the decisions of every State in the Union where the *jus disponendi* is held to be incident to the separate estate of married women."

If the powers of disposition were exercisable only within or under a power of appointment contained in the instrument creating the estate, and by its terms limited to appointments by writing only, the New York rule would undoubtedly be right. But, inasmuch as a separate estate is created, where no power of appointment is granted by the terms of the instrument creating it, we believe that, for the sake of its enjoyment, in accordance with the intent of the grantor, the power of control and disposition attaches of necessity under and by virtue of the general laws of property, unless restrained by the terms of the instrument. And if the *jus disponendi* attaches, without limitation or restraint, we believe with Lord Brougham, in *Murray v. Barlee*, that we are not authorized "to invent a new chapter in the statute of frauds, and declare that the only mode of exercising such a power shall be by a written instrument. And if a writing is not necessary to evidence the intention of a married woman to charge or dispose of her separate estate, we fully agree with Lord Cottenham, in *Tullet v. Armstrong*, 4 Mylne & Craig, 377, that such intention may be shown by parol."

It having been held in *Yale v. Dederer* that, in order to charge the separate estate, the intention to do so must not only exist, but also be declared in the very contract which is the foundation of the charge, it would be but consistent to hold that the separate estate must also be described in the same contract. Accordingly the question soon arose on the following indorsement of a note: "For value received, I hereby charge my individual property with the payment of this note. Armina Babcock." The Supreme Court of New York held her not liable, because the indorsement contained no description of the property intended to be charged. But the Commission of Appeals reversed the decision after a review of the principal New York and English cases.† It seems that the decision of the Supreme Court was the legitimate offspring of *Yale v. Dederer*, and that that case is virtually overruled by the Commission of Appeals, though it was not so declared; but, on the contrary, directly recognized. The reasoning of Hunt, commissioner, who delivered the opinion of the commission, is negative in its nature. He says: "Among all the cases there is not one that holds that, where a married woman having separate property, incurs a liability, for which she declares at the time of incurring it, and in the instrument by which it is incurred, that her separate estate shall be held, the separate property does not become charged; at least I may say, after diligent examination,

* Dom. Rel., 229-30; *Todd v. Lee*, 15 Wis., 365.

† *Corn Exchange Insurance Co. v. Babcock*, 42 N. Y., 613.

that I have met with no such case, either in the English courts or those of the last resort in this State. There are several, however, in which the precise objection has been made and overruled. There is no more propriety in the principle sought to be sustained than there would be in holding that the promissory note of a male adult must describe the property seized on execution issued on a judgment recovered upon the note."

Was there not as much propriety in the doctrine maintained in the Supreme Court, that the property should be described in the note, as there was in the doctrine enunciated in *Yale v. Dederer*, that the intent to charge the property must be specified in the note? In concluding his opinion in the last noticed case, the commissioner briefly states the English and New York principle. He says, the ground upon which the married woman's separate property should be held liable may well be rested upon the principle of *jus disponendi*; that the law gives her the practical ownership of the property; that, as she has the power of dealing with it at pleasure, she has, therefore, the power to bind it for the payment of her debts. This covered the whole case and exhausted the argument, but it was an admission fatal to *Yale v. Dederer*, and one which rendered useless his own review of the cases. The legislative enactments of New York had nothing to do with the decision of the two last cases, or any of them, beyond the kind of action to be brought and the forum. This is expressly decided by the Commission of Appeals in the above case. It is said, "It will be observed that these statutes contain the expressions, 'her separate property, as if she were a single female,' and 'to her separate use in the same manner and with like effect as if she were unmarried.' The condition of a married woman holding property to her separate use, as if she were a *feme sole*, was well understood in the jurisprudence of this country at the time of the passage of these acts. It had been in use in England and in this country for a long time. It had been the subject of leading determinations for more than a hundred years. When the legislature use this well-known description, they use it with reference to its equally well-known meaning. To ascertain, therefore, whether a married woman can now and here subject her separate estate to the payment of a debt like that before us, by an instrument like that before us, we must refer to the former adjudications respecting a married woman who held property as if she were a *feme sole*."

It is not a little discouraging to find that the Supreme Court of Massachusetts, after a lengthy discussion of this subject, conclude that *Yale v. Dederer* contains a good exposition of the law. In a recent case, this court says: "And we think, upon mature and full consideration, that the whole doctrine of the liability of her separate estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications too subtle and refined. The true limitations upon the authority of a court of equity in relation to the subject, are stated with great clearness and precision in the elaborate and well-reasoned opinions of the Court of Appeals in New York, in the case of *Yale v. Dederer*, and our conclusion is, that, when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or where the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal of the married woman may go. But when she is a mere

surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it."*

It is refreshing, however, to turn to the decisions of South Carolina, where the second principle has been adopted and followed, and find an unbroken line based upon tangible reasons,

In *Ewing v. Smith*, 3 De Sau., 417, which arose in 1811, Chancellor De Sausure, in a laborious and elegant opinion, which has often been contrasted with that of Chancellor Kent in *M. E. Church v. Jacques*, reviewed the English cases, and concluded that they established the position that in equity a married woman is to be held a *feme sole*, unless expressly restricted, and he held the separate estate liable for a bond executed by husband and wife. But he, too, was reversed in the Court of Appeals, and the very opposite doctrine established, which has not since been departed from. A majority of the chancellors declared the rule to be that a *feme covert* has no power over her separate estate but what has been expressly given to her by the instrument of settlement, and that any power so given must be strictly pursued.

A case occurred in this State in 1845, which afforded a good test of the principle adopted by the Court of Appeals. An estate was settled to the separate use of a *feme covert* to be at her *full and free disposal*, and the court held that it was not chargeable with a note executed by her and her husband. Harper, Ch., delivering the opinion of the court, said: "If anything can be considered as settled, it is the settled law of this State that, when property is given or settled to the separate use of a married woman, she has no power to charge, incumber or dispose of it, unless in so far as power to do so has been conferred on her by the instrument creating the estate, which power must be strictly pursued, in contradiction to many English cases, in which it has been held that she is a *feme sole* with respect to her separate property, and may charge and dispose of it as she pleases, unless in so far as she is expressly restricted by the instrument. This has been the settled law since the decision in *Ewing v. Smith*, followed by a great number of cases decided in conformity to it, for a period of more than thirty years, and without any decision impugning or conflicting with it. . . . Though it has sometimes been said in relation to our doctrine that a married woman is only a *feme sole sub modo*, or to the extent that the settlement makes her so, yet these expressions are inaccurate. She can in no manner of respect be considered a *feme sole*. A *feme sole* disposes of or charges her property by her own act and according to her own will, by her inherent power as owner. A *feme covert* exercises a delegated authority, and cannot exceed it. She is enabled to execute a power, as in some instances, any third person, *feme covert* or other, even those having no interest in the property, might be enabled to execute it, and bind her by their act."†

In the Supreme Court of Ohio, in the late case of *Phillips v. Graves*, 20 Ohio St., 371, the subject is well considered by Judge McIlvaine. He follows, with a slight modification, *Hulme v. Tenant*, and the later English cases. The English rule is stated to be that courts of equity, upon the principle that the *jus dispo-*

* *Willard v. Eastham*, 15 Gray, 328, per Hoar, J.

† *Reid v. Lamar*, 1 Shobhart Equity, 27, 37.

nendi is an incident to the absolute ownership, will charge the separate estate of a married woman with the payment of debts arising upon her general engagements, whether verbal or in writing, when her intention so to charge them is either express or implied, unless she is restrained by the terms of the instrument creating the separate estate, from exercising such power of disposition. He concludes: 1. That a married woman, possessed of a separate estate of real or personal property, may charge the same with her debts, at least to the extent that the liabilities may be incurred for the benefit of the estate, or for her own benefit, upon the faith of the property. 2. That such power is incident to the unqualified ownership of property, and is only limited by the terms of the instrument creating such estate, or by implication arising therefrom. 3. That the intention to charge her separate estate, at the time her liability was incurred, may be either expressed or implied. 4. That such intention may be implied from the fact that she executed a note, bond, or other obligation for the indebtedness.

Without their qualifications, these conclusions, reached after quite an elaborate review of English and American cases, are but the logical results of the first principle. The qualifications, as to the benefit of the estate, or her own benefit, and her intention, are added without reason or principle, and this fine opinion would not have been open to criticism if it had been stated that they were imposed by the powerful arm of a court of equity, simply for the protection of the wife.

However, if this case is adhered to, it is not likely that much trouble will arise in settling all questions arising on the subject in Ohio.

The Supreme Court of Missouri have adopted the first principle, and with the exception of a single slightly jarring case, it seems have decided the cases upon it. In referring to the cases at hand from the different States, bearing upon this subject, it was with no slight gratification that I discovered the recent case in this State of *Miller v. Brown*, 47 Mo., 504. This was an action to charge the separate estate of Mrs. Brown, a married woman, for a bill of goods bought of plaintiffs. The defence was threefold: First, that Mrs. Brown did not intend to charge her separate estate. Second, the goods being necessities which the husband was bound to furnish, it could not be so charged; and third, that it could not be charged by a verbal agreement.

The court, per Bliss, J., says: "In contracting a debt it is not necessary that the wife say anything about her estate, or even that she have it specially in mind. The question is, whether the contract was her own or that of her husband. If she made it for herself, in her own name, then her intention is presumed, unless her acts at the time, as by the giving and acceptance of some other security in lieu thereof, show the contrary. A promissory note would clearly establish the contract to be hers, but if she furnish no such evidence the fact that it was her own contract must be otherwise shown, and when shown, the intention follows. Mrs. Brown's declaration that she did not intend to charge her separate estate when running up a bill in her own name and upon her own credit, would not relieve her estate from the charge thereby created. The law upon this subject has been often and fully discussed by members of this court, and it has always been held that, as to her separate property, a married woman is to be regarded as a *feme sole*, and is competent to make contracts or contract debts that shall bind it in equity, whether such property be

named or referred to, or not.* In *Kimm v. Weippert*, 46 Id., 532 (the slightly jarring case alluded to), the circumstances were held to rebut the presumption of intention. The practical question, then, is not whether the *feme covert* expressly designs to charge her separate property, but whether she intends to contract a debt of her own, for if she does so, the law, and not her ideas about property, fixes the liability."

In regard to the second plea, that the articles were necessities which the husband should furnish, among other things, the court says: "In an action against the husband the right of the wife to bind him would be very material, but as against her property, if it clearly appears that the credit was solicited by her for herself, and given to her, her husband being unknown in the transaction, it does not matter whether he ought to have furnished the goods or whether she could have availed herself of his credit, if he had any. She may become surety for her husband, may execute her note or bill to raise money for a hazardous speculation, or for frivolous amusement, but if she be in need of the necessities of life for herself and children, is she to be shorn of credit because the husband refuses to furnish them, and has no credit of his own of which she can avail herself, and go without until she can convert her estate into money?"

Upon the third point, that the estate could not be charged by a verbal agreement, the court says: "It has been held by many courts that the wife's realty cannot be charged for a liability not evidenced by a writing, while others repudiate any distinction in that regard between a written and parol agreement. These opposite views are consistent with the different theories upon the general question adopted by the different courts, and, in order to decide which view is correct, we must fix upon some principle as a guide to our steps. The two leading theories are, that, as to her separate estate, the wife is a *feme sole*, that she may contract debts as though unmarried, for the payment of which her property is holden, and, upon this theory, it cannot matter whether the debt be evidenced by a written instrument or not, if it is established to be her debt. The other theory is, that the grant of a separate estate does not give the wife a general credit based upon it, but simply a right of disposition, a power of appointment, uncontrolled by the husband, and she can only execute the power in accordance with its terms. Most of the opinions sail between these two theories, now tacking toward one and then the other, but, unless the whole subject shall be rendered obsolete by the complete enfranchisement of married women in regard to their property and power of making contracts, through the adoption of the doctrine of the civil law, *one or the other of these theories must ultimately prevail with all its logical results*. Missouri, as we have seen, has adopted the first theory, and no case has yet arisen where its legitimate corollaries have been denied." This doctrine has received further confirmation by the very recent case of *Lincoln v. Rowe*, 51 Mo., 571-4, and the question seems to be definitely settled upon principle. We have seen that in South Carolina, where the very opposite principle or theory has been adopted and logically followed uniformly of decision has also been attained.

In conclusion let us turn to the Tennessee cases. The leading case in this

* *Coates v. Robinson*, 10 Mo., 457; *Whitesides v. Cannon*, 23 Id., 457; *Tuttle v. Hoag*, 46 Id., 38; *Schafroth v. Amba*, Id., 114.

State is *Morgan v. Elam*, 4 Yerg., 375, in the argument and decision of which, covering nearly one hundred pages, there was arrayed, perhaps, the finest legal talent the State has ever produced. After a most elaborate discussion, both by the counsel and the court, the views of Chancellor Kent in *M. E. Church v. Jacques*, were adopted by a majority of the court. It was held that a married woman is to be considered as a *feme sole* in relation to her separate estate only so far as the deed made her such; that the meaning of the deed is to be regarded in order to ascertain what power she has over her estate, and that the pointing out a particular mode of disposition is an implied restriction against any other.

No principle was adopted, or standard erected to which, as a premiss, every case might be referred. Each case was left to be governed by the intention of the settler, and if the instrument was silent as to the mode of disposition it was left almost at the discretion of the court. In *Porter v. Baldwin*, 7 Hump., 175, Judge Green, who delivered the prevailing opinion in *Morgan v. Elam*, says, in reference to this case, "The principle is laid down that we must ascertain by a fair construction of the deed what was the intention of the grantor, and cause that intention to be carried into effect. Upon this principle, the power of alienation is not to be restricted, on the one hand alone, to cases where it is expressly conferred, nor, on the other hand, does it exist in every case where it is not expressly prohibited, but the powers of the wife over the property, and the use she may make of it, must depend upon a fair interpretation of the meaning and intention of the settler." In this case the deed of settlement was not before the court, but it was held that it must be presumed to settle the estate upon her without restriction. The bill, which was taken for confessed, alleged that complainant had rented a house to the wife upon her agreement that he should look to her for the rent out of her separate estate, and that she had promised in writing to pay the amount due. The court held that the fair interpretation of such a settlement was that the separate estate should be available for her support, and liable in equity for necessities.

In *Litton v. Baldwin*, 8 Hump., 209, the same settlement came again before the court, but this time it was set forth. The deed reserved to Mrs. Baldwin "full power and authority, by her directions in writing, in the presence of one or more witnesses, to alienate, sell, or dispose of, in any manner she might think proper," the property settled to her separate use. She bought furniture at a clerk and master's sale, and gave a note, with Return J. Meigs as security for the purchase-money. The bill, filed to enforce payment out of her separate estate, was dismissed, the court citing *Morgan v. Elam*, and saying that a married woman can exercise no authority or control over her separate property except such as is specially given in the deed, and only in the mode therein prescribed; that the execution by a married woman of a promissory note or other contract, without reserve, is not sufficient to charge her separate estate; that there must be proof of an express agreement and intention to charge.

Two decisions of the Supreme Court were not sufficient to explain the powers and liabilities of the wife under this settlement, and it came again before the court in the case of *Hoggart v. White*, 2 Swan, 265. In this case the court held that a mortgage of a slave, part of the separate estate, executed by her, would be enforced against her; that, as the settlement gave her power to "alienate,

sell, or dispose of" the property, as she saw proper, this included the power to mortgage.

In *Powell v. Powell*, 9 Hump., 477, Judge Turley says: "A *feme covert*, acting with respect to her separate property, is competent to act in all respects as a *feme sole*." But, in view of the prior decisions, this can only be true in this State, if at all, when the settlement is silent as to the power of disposition. The statement of Judge Turley is *obiter*, but it shows how unsettled were the ideas of our most learned judges on this subject.

The Tennessee cases are well reviewed by Judge Andrews in *Young v. Young*, 7 Cold., 461. He considers that the cases settle only these propositions:

1. That the power of disposition possessed by a *feme covert* over her separate estate is determined by the intention of the person granting or devising the estate, to be ascertained by a fair construction of the deed or will.

2. If the instrument creating the separate estate contains any express or implied restrictions upon the power of disposition, either as to the mode of conveying or the purpose for which it may be conveyed, she can convey it in no other manner and for no other purpose.

3. When a general power of disposition is by the instrument of settlement expressly conferred upon a *feme covert*, without restriction or limitation as to mode or purpose, she may convey the estate as a *feme sole* by proper instrument of conveyance.

He says, that when the settlement is silent as to her power, and no mode of disposition is pointed out, the property being conveyed simply "for her separate use," that these words have no common nor technical meaning which indicate an intention to restrict the powers of the wife; that it would probably occur to but few, if any, persons, not lawyers, that these words could imply any such intention. This is consistent with the reasoning of Judge Green, in *Porter v. Baldwin*, *supra*, but at war with all the cases which hold that the wife has no power except what is specially granted to her. He says none of the cases reviewed by him involve or decide the question of the power of a married woman to dispose of her separate estate in realty, not as a *feme sole*, but as a *feme covert*, by deed executed jointly with her husband and privily acknowledged under the statute; and as the deed in the case before him was entirely silent as to the mode of disposition, and her conveyance was, under the statute, with her husband, he held it good. He admits that the statute, as a substitute for fine and recovery, neither gave her a new power of disposition nor took from her any power, but contends that as at common law, by fine or recovery, she could convey her real estate, whether legal or equitable, she could also in these modes dispose of her separate estate permitted to be held by a court of equity. This argument is ingenious, but I do not think it is applicable; for if a married woman could have conveyed her separate estate in equity as a *feme sole*, *a fortiori* would a recovery suffered, or a fine levied at law, be held good in equity? but if she could not in equity convey the estate which she held by sufferance of equity, so much the less would her conveyance at law by any mode whatsoever be held good. But aside from this question, the court was of opinion that, as the property was for her separate use, and the deed silent as to her power, the wife was competent to convey from the presumed intention of the grantor.

In the case of *Gray v. Robb*, 4 Heisk., 74, the language of the settlement was:

"To have and to hold said lot to said Lucy F. Gray, her heirs and assigns, forever, to the sole aid and behoof of the said Lucy F. and her heirs forever." The court, per Nicholson, C. J., held that the words "sole aid and behoof" vested in the wife an estate for her sole and separate use, and that a conveyance of the lot by her husband and herself, with privy examination under the statute, was a nullity. The case of *Young v. Young* seems not to have been called to the attention of the court, as it was not noticed. The case was very briefly disposed of, the court saying: "Upon the well-settled rule in this State, a married woman has no other power to convey or dispose of her separate estate than that given to her by the instrument which conveys to her the separate estate. If the instrument gives her no power, she can exercise none."*

The case of *Head v. Temple*, 4 Heisk., 34, also affords a striking example of the difficulty of determining the power of the wife from the intention of the grantor merely. A "marriage contract" which recited that the parties have agreed to execute a contract whereby the property of Gulielma D. Temple shall be protected and assured to her own sole and separate use, free from the debts or claims of the creditors of the husband, conveyed real and personal estate to Lucien M. Temple, the intended husband, in trust for the sole and separate use of the said Gulielma D. and her heirs forever, free from the claims of any creditor of the said Lucien M., and free from his power of disposition, except with the consent and concurrence of the said Gulielma D., and concluded with these declarations: "It being the real intention of this conveyance to continue the said Gulielma D., in reference to her said property, a *feme sole*, to all legal intents and purposes. It is further understood, that the power is expressly reserved to the said Gulielma D. to dispose of all or any of her property, as well of what is above described as of her real estate, by last will and testament, or by deed of gift, and if she shall fail to do so, then it shall descend to her heirs, and in case she shall die without children, or issue, it shall belong to the said Lucien M. Temple, in the event he survives her; but her right to dispose of the same as aforesaid, in any way which she may choose, is in no event to be impaired or restricted." The court held, per Turney, J., that the settlement did not confer a right to mortgage the lands to secure a note made by husband and wife.

The head note of *Shacklett v. Pope*, 4 Heisk., 104, is as follows: "It seems that a wife's separate estate may be charged with expenditures for the benefit of the estate. But a wife having a separate estate in land in Tennessee and also in Mississippi, the court refused to charge the Tennessee lands with expenditures for the benefit of the Mississippi estate."

What powers were granted to the wife, if any, by the settlement, does not appear. The court drew a distinction between the general debts of the wife and those contracted for the benefit of the estate and upon its credit, and a fair inference from the whole case, which is lengthy, is, that the latter class of debts will be enforced against a married woman's estate by our present Supreme Court.

With this cursory view of the Tennessee cases, it but remains to see what effect the late act of the legislature has upon the subject. The sections bearing upon it are as follows:†

* 4 Yerg., 375; 8 Hump., 159; 1 Swan, 488; 5 Sneed, 450.

† Act of 1869-70, ch. 99.

SECTION 1. Married women over the age of twenty-one years, owning the fee or other legal or equitable interest in real estate, shall have the same powers of disposition by will, deed, or otherwise as are possessed by *feme sole* or unmarried women.

SEC. 2. The powers of said married women to sell, convey, devise, charge, or mortgage their real estate shall not depend upon the concurrence of the husband or his consent thereto: *Provided*, Her privy examination to any deed, mortgage, or other conveyance, shall take place before a chancellor or circuit judge of this State, or clerk of the County Court.

SEC. 3. *Femes covert*, or married women, owning a separate estate, settled upon them and for their separate use, shall have and possess the same powers of disposition by deed, will, or otherwise, as are given by the first and second sections of this act: *Provided*, The power of disposition is not expressly withheld in the deed or will under which they hold the property.

SEC. 6. The provisions of this act, except the provisions of the third section of this act, shall apply to and embrace only such *femes covert*, or married women, as have abandoned their husbands, or who may refuse to live or cohabit with their husbands, or whose husbands may be *non compos mentis*, insane, or of unsound mind, and also to such married women, or *femes covert*, whose husbands may fail or refuse to cohabit with, or have abandoned, such married women or *femes covert*, etc.

It is to be regretted that this act was not more explicit and independent of that part of it relating to married women of the class mentioned in the sixth section. Trouble may arise in its construction. The legislature was doubtless painfully aware of the confused condition of matters, and intended to give the married woman full power to dispose of her own separate property, unless the settlement expressly restrained it, and to abolish the rule adopted by the courts of looking to the settlement for affirmative powers to be ascertained from its supposed meaning.

There is no doubt of her power, unless restrained, to make any charge upon, or disposition of, her estate she pleases. All she has to do is to properly execute an instrument. But the troublesome question is, How are her contracts and engagements, made by her without her husband's concurrence or consent, or not authenticated by privy examination, to be viewed in a court of equity? By what principle will this court be governed in deciding such questions? I am of opinion that a proper construction of the act will allow them to enforce every contract or engagement fairly and voluntarily entered into by her upon her own credit, or that of her estate, whether the contract or engagement be for her own benefit, or that of her estate, or not. The *jus disponendi* has been given her by statute, and the courts have no longer to look to the instrument of settlement except to see that her power is not restrained. The proviso of the second section will be sufficiently operative, notwithstanding the absolute power granted in the first section, by holding valid, in a court of law, all such instruments as are executed according to it; and the first section is made fully operative by courts of equity taking jurisdiction to enforce all other contracts and engagements whenever fairly and voluntarily made.

A contrary view of the statute would be inconsistent with the first section, which gives the married woman the same powers as an unmarried woman;

and unless the very opposite principle was adopted, there would be none upon which to proceed. The intention or meaning of the settlement could not be looked to to ascertain her power, for she had the power; she has simply failed to exercise it in the mode laid down in the statute.

The construction contended for is sustained by what has been quoted and said above in relation to the married women's acts, and also by analogy from the contracts of male adults, which may be enforced by laying hold of their real or any other estate. It will be equitable and just; for there ought to be no distinction except as to priority of satisfaction, perhaps, between engagements or contracts fairly entered into, but not secured by mortgage, and those of the same nature so secured. And, finally, this construction will, I feel confident, afford a solution to most of the questions constantly arising on the subject.

It will be seen from this article that the decisions of the courts of Tennessee, New York, and other States, have been confused and contradictory on this subject, and in England this doctrine seems to have been modified in a large number of later cases, cited in Benjamin on Sales, second edition, 31.

The modification or change is this: instead of the separate estate being liable for the *general debts* of the wife, it was necessary for the party claiming the debt and seeking satisfaction of the *separate estate*, to show that *the contract was made upon the credit of the separate estate, so intended by the feme, and so understood by the person with whom she is dealing.*

So it may be true, under the English doctrine as well as that of several of the States, that the wife, as to her separate property, is competent to act in all respects as a *feme sole*, unless specially restrained; but the court of equity can require that the contract be made upon the credit of the separate estate, so intended by her and so understood by the party with whom she deals. This contract to charge the separate property with the debt may be raised by implication, in those cases where necessities are furnished the wife, or where the debt was made for the special improvement and advantage of the separate estate. And by the English cases the estate may be thus charged for a debt, although not for the benefit of the wife.*

Chancellor Kent, in the celebrated case of the Methodist Episcopal Church v. Jacques,† which came before him while Chan-

* See authorities cited in The Corn Exchange Insurance Company v. Babcock, 42 N. Y., 613.

† Methodist Episcopal Church v. Jacques, 3 Johnson Ch. R., 120. This case reviewed in the Court of Errors, 17 Johns., 548.

cellor of New York, elaborately reviewed the English cases. The effect of his opinion was that the wife had no power of disposition, except that created by the instrument through which the separate estate was obtained, and that the estate was unalienable except in the mode provided. This opinion was reversed in the Court of Errors for that State, and Judge Kent, in his *Commentaries*,* explains the difference between the opinion of himself as Chancellor and the Court of Errors for that State. He says: "But it was held (and in that consisted the difference between the decision in chancery and the correction on appeal) that though a particular mode of disposition was specifically pointed out in the instrument or deed of settlement, it would not preclude the wife from adopting any other mode of disposition, unless she was by the instrument specially restrained in her power of disposition to a particular mode. The wife was, therefore, held at liberty by that case, to dispose of her property as she pleased, though not in the mode prescribed, and to give it to her husband as well as to any other person, if her disposition of it be free."

Judge Kent, in the same *Commentary*, on this case, thus criticises the opinion of the Court of Errors. He says: "This decision renders the wife more completely and absolutely a *feme sole* in respect to her separate estate than the English decisions would seem to authorize, and it unfortunately withdraws from the wife those checks that were intended to preserve her more entirely from that secret and insensible but powerful marital influence, which might be exerted unduly, and yet in a manner to baffle all inquiry and detection."

There is much force in this criticism when applied to a conveyance by the wife of the separate estate to the husband. But, in other modes of disposition and as to other parties, she is protected under the rule of the court requiring the contract to be made directly in reference to the separate estate, or by necessary implication, when for her benefit.

The right to convey implies the right to charge and the right to mortgage.†

* Kent's Com., vol. ii., 165.

† Newhart v. Peters, 80 N. C., 166; Jackson v. West, 22 Md., 71; Gunter v. Williams, 40 Ala., 561; Taylor v. Shelton, 30 Conn., 122; Bishop, L. M. W., ch. 36, § 872.

While the consent of the husband or trustee, as required by some of our statutes, and the privy examination, all afford protection to the wife in the conveyance to third parties, the greatest danger to the separate estate is, perhaps, the right to charge it with the debts of the wife, which charge may result in the absolute sale *invitum*. But in this she has the protection here shown.

In the case of *Morgan v. Elam*,* after a most elaborate argument and thorough review of the cases, the opinion of Judge Kent was adopted rather than that of the Court of Errors of New York, in regard to the case of *Methodist Episcopal Church v. Jacques*.

The fault, if any, in this position adopted in *Morgan v. Elam*, following the argument of Chancellor Kent, is, that it allows the intention of the settler to govern in each case, without settling any principle or uniform rule. By this opinion, "the woman is neither *feme covert* nor *feme sole*." This makes every settlement the subject of a lawsuit.

A full review of the Tennessee cases will disclose a failure to fix any rule as to the mode of charging the *separate estate*, except as gathered from the settlement or deed under which the property is held. It is true that in *Shacklett v. Pope*, 4 Heiskell, the court held that the separate estate might be charged with expenditures for the benefit of the estate. A distinction was drawn between the general debts of the wife and those contracted for the benefit of the estate. It is thought that the Tennessee legislature, by Act of 1868-9, chapter 99, has restored the English doctrine which allows the wife to act as a *feme sole* as to her separate property.

The doctrine as declared by Judge Kent, in this great case, has not only been adopted in Tennessee, but perhaps also in South Carolina, Kentucky, Maryland, Illinois, Georgia, Rhode Island, Florida, Pennsylvania, and perhaps others, while the contrary doctrine was held in Connecticut, Alabama, Virginia, and perhaps others.†

* *Morgan v. Elam*, 4 Yerger (Tenn.), 375; see also, to same effect, *Porter v. Baldwin*, 7 Hump., 175; *Litton v. Baldwin*, 8 Hump., 209; *Hogart v. White*, 2 Swan, 265. In *Powell v. Powell*, 9 Hump., 477, is an *obiter* of the contrary view; also see *Young v. Young*, 7 Cold., 461; *Gray v. Robb*, 4 Hiesk., 74; *Head v. Temple*, 4 Heisk., 34.

† 2 Kent Com., 166, 167 (note a, 1), where a large number of State authorities

The State of New York did not strictly follow the Court of Errors in *Methodist Episcopal Church v. Jacques*. For the case of *Yale v. Dederer** looks like the announcement of a different principle. In this case it was held that Mrs. Dederer, who had signed a note with her husband, was not liable, because nothing appeared to show that the note was for the *benefit* of the wife, nor a *contract* in reference to the separate property.

And the same case came before the Court of Appeals again in 22 New York, when additional evidence had disclosed the fact that at the time of signing the note she *intended* to *charge*, and did expressly *charge* the separate estate with the payment of the note, and it was held that the estate was liable. The effect of this case was to charge the separate estate in either of the following ways:

1. That if the *contract* had reference to the separate estate and was *intended* as a charge;
2. Or, if the consideration had been for the *benefit* of the wife.

But the legislature of the State of New York, in the year 1848, made all the property, both real and personal, of any female already married, or who may hereafter marry, not subject to the disposal of the husband, nor liable for his debts; made the same in law "*her sole and separate property.*"†

The Act of 1848, as amended by Act of 1849, provided, sec. 3: "Any married female may take, by inheritance or by gift, grant, or devise, or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues, and profits thereof, in the same manner and with like effect as if she were unmarried; and the same shall not be subject to the disposal of her husband, nor be liable for his debts."

are cited; Bishop, *Married Women*, vol. i., ch. 36. As to general doctrine, see Adams Eq., § 44; Hill on Trustees, 421, 424 (notes). In Illinois, in the case of *Swift v. Castle*, 23 Ill., 209, the authorities are reviewed and the opinion of Kent sustained.

* *Yale v. Dederer*, 18 N. Y., 265.

† Schouler's *Domestic Relations*, 211; 2 Bright, *Husband and Wife*, American ed., 1850; Laws, 1848, c. 200; Laws of 1849, c. 375.

These statutes are said to be remedial in their nature, and should be liberally construed.*

It will be found that the New York Acts of 1848 and 1849 give the wife power to "convey," "devise," etc.; but nothing is said in reference to the power of the *feme covert* to make a *contract*, which is an important power.

If the wife has the power to "convey" or "devise," and the requirements of the statutes are complied with as to the execution, delivery, and registration of such instruments, then of course the title passes, both in law and equity. But the great difficulty is the power to be exercised over the property in a court of equity, especially in regard to holding the same chargeable with the debts and contracts of the wife, in what cases the court of equity will and will not interfere. We have seen that, by the strict rules of the common law, the existence of the wife is suspended in that of the husband, and that she is incapable of making a contract which will bind her; while, on the other hand, the court of equity, treating the *separate estate* as a creature of that court, does allow the wife, for certain purposes, to own property, and bind the same for certain contracts. But the State of New York, in 1862, provided, in an amendatory act, that the married woman could "bargain, sell, and convey such separate property, and enter into any *contract* in reference to the same, with like effect in all respects as if she were unmarried; and she may, in like manner, enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property." The Act of 1862, ch. 172, § 7, also provided that "a married woman may be sued in any of the courts of this State; and, whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate."

This act seems to liberate the wife entirely from all the shackles and disabilities of marriage in reference to the ownership of property, and the reciprocal rights and obligations of herself and those

* *Power v. Lester*, 17 Howard Pr., 413; *Diner v. Diner*, 6 Smith (Penn.), 106; *Goss v. Cahill*, 42 Barb., 310, 315. Same in reference to the Mississippi Act of 1839, called the "Woman's Law;" *Ratcliffe v. Dougherty*, 24 Miss., 181; *Dunbar v. Meyer*, 43 Miss., 679.

with whom she deals (the husband excepted). This seems to imply, too, that the husband need not be joined with the wife either as plaintiff or defendant, although the code of procedure then in existence provided that "when any married woman is a party (tort) her husband must be joined with her." It is true the code allowed her to sue alone when the action concerns her separate property, but these acts appear to make it unnecessary for him to be a party in any action whatever.

Under this Act of 1848-9, the courts of New York were inclined to hold that the power of the married woman to make executory contracts, not in reference to the separate estate, remained as at common law, and that equity could enforce certain obligations.*

But it would seem that, under the Act of 1862, no necessity exists for the application of the unwritten law in regard to the separate estate, as she is made, to all intents and purposes, a *feme sole*. Under this statute she is to be chargeable with her general contracts, like other persons without disabilities. The execution of a note fixes her liability, like other persons.† This power to contract, if unlimited, certainly implies the power to charge her property with any debt, even in a court of common-law jurisdiction.‡

The American Doctrine.—Considerable has already been said in reference to the adjudications of certain of the American States, but it may be necessary to make further reference to adjudications of the different States, and then it will be attempted to draw some conclusions as to the state of the law, as derived from the vast multitude of conflicting decisions upon this question of the

* *Audriot v. Lawrence*, 33 Barb., 142; 2 Kent (notes), 111, 163.

† On this point see *Barton v. Beer*, 35 Barb., 78. This statute was thus construed in *The Corn Exchange Insurance Co. v. Babcock*, 42 N. Y., 613.

‡ But, under this statute of New York, reasoning, as the courts always did, from prior decisions and the English doctrine, there was really a limit to the power to contract, or rather a qualification of the capacity to contract, in the following particulars:

1. Where the debt is for the benefit of the wife, the liability arises *ipso facto*.
2. If the contract is for the benefit of another, the intent to charge must appear in the contract creating the indebtedness: *Yale v. Dederer*, 22 N. Y., 450; *The Corn Exchange Insurance Co. v. Babcock*, 42 N. Y., 613, and authorities cited. This decision was rendered in 1870.

wife's right to charge the separate estate with her debts and obligations.

The Supreme Court of North Carolina has had considerable difficulty in settling this question. In 1850, the case of *Harris v. Harris** was met by a *dissenting* opinion from Judge Pearson, which will well repay a careful reading.†

This case was in reference to personal property, and the majority of the court, Ruffin, C. J., delivering the opinion, fully sustained the English doctrine and that of New York at that time, which made the *feme covert* entitled to a separate estate, capable of acting in all cases as a *feme sole*, except there be some clause of restraint of her dominion. But this was subsequently overruled as a *dictum*.‡

Both majority and dissenting opinions refer to *Frazier v. Brownlow*,§ decided some time before in that State. In the case of *Frazier v. Brownlow*, the wife had made a contract and expressly agreed that the debt should be paid out of the separate estate, and this contract was held to bind the separate estate.

The principle decided in this case is very much the same as that of *Yale v. Dederer*, in New York,|| both of which hold that the *feme covert* can bind the separate estate, if the contract is made in direct reference to the estate, and especially if for the *benefit* of the *feme covert*.

The case of *Pippen v. Wesson* was fully argued and a thorough opinion by Judge Rodman, and this was the point in the opinion: "*A married woman has no power to contract a personal debt, or enter into any executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly or by necessary implication arising out of the na-*

* *Harris v. Harris*, 7 Ire. Eq., 111.

† Dissenting opinion of Judge Pearson in the case, *Harris v. Harris*, *supra*.

‡ *Knox v. Jordan*, 5 Jones's Eq., 175.

§ *Frazier v. Brownlow*, 3 Ire. Eq., 237.

|| *Yale v. Dederer*, 18 N. Y., 265; 22 N. Y., 450.

The same doctrine as in *Frazier v. Brownlow* was held in that State in the following cases: *Wharton v. Malcolm*, 6 Jones's Eq., 120; *Pippen v. Wesson*, 74 N. C., 437; *Webb & Roundtree v. Gray*, 74 N. C., 447; *Atkinson v. Richardson*, *Ibid.*, 455; *Withers v. Sparrow*, 66 N. C., 129.

ture or consideration of the contract, showing that it was for her benefit."

This is the instrument sued on in that case;

"\$2986.77."

"JULY 24th, 1874.

"On the first day of February next (1875) we promise to pay W. M. Pippen, or his order, two thousand nine hundred and eighty-six $\frac{7}{10}$ dollars, for value received.

Signed,

"CHARLES M. WESSON, [SEAL.]

"CARRIE M. WESSON." [SEAL.]

The plaintiff filed a complaint alleging the indebtedness of the defendants, and the defendants filed a demurrer, assigning as grounds for such demurrer that the complaint does not state facts sufficient to constitute a cause of action against the said Carrie M. Wesson, in that "it does not appear on the face of the complaint that the contract, specified as being entered into by her, was made with the written consent of her husband, or for her necessary personal expenses, or for the support of her family, . . . or that the debt secured by the note was specifically charged on her separate estate, at or before the execution thereof."

The demurrer was sustained. The court says: "The common law, by which the contract of a married woman was void, continued to be the law in courts of law of this State, until the adoption of the Constitution of 1868. In courts of equity, it was settled that a married woman might have an estate settled to her separate use, and that although she had no power to bind herself personally by a contract, she might specifically charge her separate estate, and courts of equity would enforce the charge against the property. But, in order that her contract should have the effect of creating a charge, it must refer expressly, and not by implication, to the separate estate, as the means of payment." And refers specially to *Frazier v. Brownlow*, and *Knox v. Jordan*, and *Withers v. Sparrow*. He says that "the words 'not by implication,' though found in the decisions, are not to be understood in the strictest sense as excluding necessary implications."

For this last idea, he refers to *Withers v. Sparrow*, because in that case the separate estate of the wife was not *expressly* charged in the contract for the loan of money, but it appeared that the money was used for the *benefit* of the separate estate, and, therefore, the court held a contract to charge by implication.

The case of *Withers v. Sparrow* was thoroughly and exhaustively argued by Messrs. J. H. Wilson, Guion, Vance & Dowd, and W. H. Bailey, the brief of the latter being quite full and comprehensive. All the authorities of the State were reviewed.

These cases, therefore, clearly settle the doctrine in North Carolina substantially as follows:

1st. That the English rule, as followed formerly in the State of New York, does not prevail in this State.

2d. That a married woman, entitled to a separate estate, is regarded as a *feme covert*, and subject to every disability of the common law except as she may have power conferred upon her under the deed of settlement in express and positive terms.*

3d. That to charge the separate estate, the contract must have specific reference to the same, or by necessary implication arising out of the nature or consideration of the contract, showing that it was for her benefit.

4th. That any contract she may make must have the concurrence of the trustee, if there be one.

5th. That since the Act of 1872,† the contract must have the written concurrence of her husband.

6th. That section 6, article 10, of the Constitution of 1868, nor the Act of 1872, did not have the effect to enlarge her special power of contracting into a general power, but to abridge the special power by having the husband's consent.

Judge Rodman concludes the opinion in *Wesson v. Pippen*‡ in the following expressive language: "We put our decision on the ground that a married woman has no power to contract a personal debt, or to enter into any executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly or by necessary implication arising out of the nature or consideration of the contract, showing that it was for her benefit. Whether the contract would be good if it did expressly charge the estate, but was not for the wife's benefit, it is unnecessary to say."

* *Hardy v. Holly*, 84 N. C., 661. In this case of *Hardy v. Holly*, Judge Ruffin again reviews all the authorities, and overrules the doctrine of the English courts, and the case of *Harris v. Harris* is considered overruled by *Knox v. Jordan*.

† *Battle*, Revisal, chap. 69; *Harris v. Jenkins*, 72 N. C., 183.

‡ *Wesson v. Pippen*, 74 N. C. Rep., 437.

It will be seen, therefore, that this case leaves it an open question as to whether or not the charge in all cases must be a contract for the *benefit* of the wife. As the contract is only enforced against the property, and by a court of equity, it is safe to say that a charge would never be enforced under circumstances where undue advantage had been taken of the wife, or where she was in no manner benefited. Parties who trade with a *feme covert* are bound to take notice of her disabilities, and therefore have no right to complain at the result.*

Another question has not been very fully discussed in this State, as to whether the *contract*, sufficient to charge the land, must be in writing or not. It is inferred from the cases in this State, that this contract need not be in writing, and that the property is subject to the payment of its owner's debts, with this difference, that owing to the general inability of the wife to contract, the court of equity will only enforce those contracts made for the benefit of the wife, whether written or verbal, especially if the contract has direct reference to the separate estate.

In the State of Missouri, it has been expressly decided that to charge the wife's separate estate the contract need not be in writing.† And the same is held in Alabama and other States. It is true that in Missouri and Alabama the wife, as to her separate estate, is regarded as a *feme sole*, and this may have influence in deciding that the debts need not be charged in writing. This doctrine should, at least, apply to those cases in North Carolina where the wife holds the separate estate, generally, without any special restraint or special power of appointment. Of course, if the settlement *prescribes* a mode of disposition, this excludes all other modes of charge under the doctrine of the wife's power as there held.

* It is true that in this State the wife may convey her lands, being separate estate, and may mortgage the same, the husband joining in the deed, and this, too, as security of the husband, or for money not for her benefit. This is, however, by virtue of the power to convey under the Constitution and laws, including the privy examination: *Newhart v. Peters*, 80 N. C., 166; *Purvis v. Curstaphan*, 73 N. C., 575; *Shinn v. Smith*, 79 N. C., 310; *Jeffrees v. Green*, *Ibid.*, 330.

† *Miller v. Brown*, 47 Mo., 504 (reported in 4 American Reports, 345). See opinion, to the same point, of Lord Brougham in *Murray v. Barbe*, 3 Mylne & Keen; *Story's Eq.*, § 1400. The same is held in Alabama: *Ogley v. Skelheimer*, 26 Ala., 332.

Another very important question is decided in the case of *Pippen v. Wesson*, in reference to the *constitutional* and *statutory* separate estate in that State. The section 6 of article 10 of the Constitution of North Carolina for 1868 provides as follows :

"The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may after marriage become in any manner entitled shall be and remain the *sole* and *separate* estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised or bequeathed, and, with the written assent of her husband, conveyed by her as if she were unmarried." Then the Act of 1871-2, section 17, provided : "No woman during her coverture shall be capable of making any contract to affect her real or personal estate, except, etc., without the written consent of her husband, unless she be a free-trader as hereinafter allowed." They hold that the terms "sole and separate estate" had a known and definite meaning in the law when the Constitution was framed, and it must be deemed that they were used in the sense which had been affixed to them by prior adjudications of this court. It was said that the separate estate had never been held to confer on the married woman the absolute power of disposition over the estate as if she were a *feme sole*, neither did it give her a general capacity to *contract*.

The result of the opinion was that this constitutional *separate estate* was intended to take the place of a deed of settlement and must be construed as such deeds had been, as conferring on married women no powers beyond those expressly given or implied. That neither an absolute power of disposition, nor the general power to contract, were necessary incidents to this *statutory separate estate*.

It was also held that the Act of 1871-2 did not have the effect to allow a *feme covert* to make a contract she could not make before the passage of the act, but that she shall not make such contracts as by existing law she had the power to make, without the consent of her husband. The object was not to enlarge her special power of contracting into a general power, but to abridge the special power by requiring the husband's consent. Upon this construction of the Constitution and the Act of 1871-2 the court say :

"If a married woman can bind her real estate by an executory contract to pay money, as to which she is not privately examined, the safeguards against conveyances by the undue influence of her husband, provided by this section, would be easily defeated. Her real estate would be liable to sale under execution, and she would thus *indirectly* convey when she could not *directly* do so."

The statutory separate estate as now created by the several acts in the different States, may, therefore, be subject to the same charges in a court of equity as if created by a deed of settlement, and for the same reasons. There is a *dictum* of Judge Boyden, in the case of *Withers v. Sparrow*,* holding that article 10, sec. 6, of the Constitution had the effect to constitute the wife a *feme sole*, as to the general power to contract, the same as held in England and New York, but the case of *Pippen v. Wesson* overrules that decision. Indeed, the decision of the question was not called for in *Withers v. Sparrow*, as the contract was in reference to the separate estate, and directly for the wife's benefit.†

Must the Contract in reference to the Separate Estate describe the Property thus to be Charged?—This question was fully discussed in the case of *The Corn Exchange Insurance Company v. Babcock*. The action in this case was brought upon three promissory notes, upon each the following indorsement of the defendant:

"For value received, I hereby charge my individual property with the payment of this note.

"ARMINA BABCOCK."

The notes were indorsed in 1863 by Mrs. Babcock, and she had a separate estate in real property.

It was found by the referee that the defendant indorsed for the benefit of the other defendants (one of whom was her husband), and that she had no interest in the transaction. One principal objection to a recovery was, "that the instrument creating the charge should contain a description of the property intended to

* *Withers v. Sparrow*, 66 N. C., 129.

† The Supreme Court of North Carolina, in construing the statutory separate estate as stated in the text, refers for support to *Yale v. Dederer*, 22 N. Y., 450; *Jones v. Crostwait*, 17 Iowa, 393; *Rhodes v. Gibbs*, 39 Texas, 432; *Bibb v. Pope*, 43 Ala., 190; *Maclay v. Love*, 25 Cal., 387; *Smith v. Greer*, 31 Cal., 476; *Montgomery v. Sprankle*, 31 Indiana, 113; *Carpenter v. Mitchell*, 50 Illinois, 470; *Whitworth v. Carter*, 43 Miss., 61; *De Fries v. Conklin*, 22 Mich., 255.

be charged, or, at least, a reference by which it can be identified." It was said that this proposition had been sustained in *Kelso v. Tabor*,* but after reciting the acts of the legislature, and the New York and English cases at great length, the court decides that the contract need not describe the property to be charged any further than as her separate property; that the charge need not be in such form as to create a specific lien. The court says, by way of reasoning: "There is no more propriety in the principle sought to be sustained than there would be in holding that the promissory note of a male adult must describe the property seized on execution issued on a judgment recovered upon the note. In each case, the note or bond creates a binding obligation. The law holds all of the property of the maker or obligor responsible for its satisfaction. The judgment, when recovered, creates the lien. When the proceeding was in equity strictly, it may have been necessary that the judgment should specify the property against which the process of the court should issue." It may be observed that under the New York statutes of 1862-3, when a judgment is rendered against a *feme covert*, execution is ordered against her *separate* property in the same manner that other executions issue. Perhaps this is not done in many other States, as, in most instances, the charge is held valid by a court of equity as against the *property*, and no process against the person of the *feme covert*.†

It is not proposed to go more largely into the decisions of the different States, but the reader is referred to chapter 86 of Bishop's *Law of Married Women*, in which the notes make quite a full reference to the decisions of the different States.

The Result of the American Doctrine.—On this point, the author agrees with Mr. Bishop,‡ who says: "While there is no

* *Kelso v. Tabor*, 52 Barb., 125.

† To sustain the proposition that no special reference and description of the separate estate is necessary, the following authorities are cited: *Acts*, 1862-3; *Episcopal Church v. Jacques*, 17 Johns., 548; *North American Co. v. Dyett*, 7 Paige, 9; *Yale v. Dederer*, 18 N. Y., 265; 22 N. Y., 450; *Owen v. Cowley*, 36 N. Y., 600; *Ballin v. Dillage*, 37 N. Y., 35; *White v. McNett*, 33 N. Y., 371; *Hulme v. Tenant*, 1 Brown Ch. Cases, 16; and many other English cases, including Mrs. Mattheiman's case (decided in 1866), *Eng. Law Rep.*; 3 *Eq. Cases*, 781.

‡ 1 Bishop, L. M. W., 869.

general harmony of doctrines in this country, there is a strong tendency manifesting itself in some courts more than in others to restrict to a greater or less degree the power of the *feme covert* over her separate estate."

Of course, this is the effect in those States like Tennessee, Rhode Island, Pennsylvania, and especially South Carolina, in which not only the common legal disability of a *feme covert* is relied on, but she is confined strictly to the power contained in the settlement, and, consequently, where no power to alienate or charge is expressly given, she is under almost complete disabilities, even as to the separate estate's allowing a court of equity to enforce a certain limited class of obligations.

But the States of New York, Virginia, Florida, Illinois, Kentucky, and other States where they are disposed to hold that a married woman, who has a separate estate, is entitled to the *jus disponendi*, and has a right to act as a *feme sole* in equity, have limited and greatly qualified the wife's capacity to contract debts to be satisfied out of the separate estate.*

For illustration, take New York, with the bold announcement of the English doctrine in the celebrated case of *Methodist Episcopal Church v. Jacques*, in which it is declared in general terms that the wife, as to separate estate, could act in all respects as a *feme sole*, in the subsequent cases of *Yale v. Dederer*, and the *Corn Exchange Insurance Company v. Babcock*, holds that the wife is not liable for her general contracts; that she is not liable on a note or bond, except in the contract the separate property is alluded to, and the credit given to the same, either expressly or by necessary implication.

It is true that in the latter case it was held that she could charge the separate estate for a debt not her own, and not for her

* As to the adjudications of the several States in regard to the *jus disponendi* or otherwise, the following cases may be consulted with profit: *Weeks v. Sago*, 9 Ga., 199; *Caldwell v. Sawyer*, 30 Ala., 283; *Baker v. Gregory*, 28 Ala., 544; *Maibey v. Bobe*, 6 Florida, 381; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill., 398; *Burch v. Breckinridge*, 16 B. Mon. (Ky.), 482; *M. E. Church v. Jacques*, 17 Johns., 548; *Knox v. Jordan*, 5 Jones Eq. (N. C.), 175; *Crisman v. Waggoner*, 9 Barr (Pa.), 473; *Thomas v. Folwell*, 2 Whart., 11; *Metcalf v. Cook*, 2 R. I., 355, 363; *Ewing v. Smith*, 3 Des. (S. C.), 417; *Adams v. Mackey*, 6 Rich. Eq., 75; *Williamson v. Beckham*, 8 Leigh, 20, 24; *Whiting v. Rust*, 1 Grat., 483.

benefit, but upon the condition "*that the intent to make the charge must be declared in the contract creating such indebtedness.*"*

Then, again, the strong statutes of 1862-3 are subjected to the same construction in their tendency to *limit* the wife's capacity to charge her separate estate with debts. North Carolina, also, by a majority opinion in *Harris v. Harris*, announced the English doctrine (the earlier English doctrine) that, as to the separate estate, the wife could act as a *feme sole*; but, in the subsequent cases of *Knox v. Jordan* and *Pippen v. Wesson* this doctrine is overruled, and the rule, upon which equity will enforce the wife's contracts, is established as being founded on the contract made in direct reference to the separate estate and for her benefit. The constitutional and statutory separate estate was held in the latter case to be subject to the same rule, and the idea of the wife's liability on her *general contracts*, or a contract not relating directly or by necessary implication to the separate estate, was completely ignored.

As the courts of New York never could entirely escape the reasoning of Judge Kent in the case of the Methodist Episcopal Church *v. Jacques* (although overruled by the Court of Errors), so the dissenting opinion of Judge Pearson (afterwards Chief Justice of the Court) was followed in its reasoning and principles enunciated, while the majority opinion was disregarded.†

Must the Intent to Charge appear in the Contract?—Some of the cases hold that the intent to charge must appear in the instrument itself, especially when not for the benefit of the estate. Selden, J., said, in *Yale v. Dederer*: "We must recur to the foundation of the power of a *feme covert* to charge her separate estate. Starting from this point, it is plain that no debt can be charged, which is not connected by agreement, either express or implied, with the estate.

"If contracted for the benefit of the estate itself, it would of

* The Corn Exchange Insurance Company *v. Babcock*, 42 N. Y., 613, reported in 1 American Reports, 611; see page 614 for the point made in the text; *Yale v. Dederer*, *supra*.

† *Harris v. Harris*, 7 Ire. Eq., 111 (dissenting opinion, 120); *Knox v. Jordan*, 5 Jones Eq., 175; Constitution of N. C., 1868; Acts of 1871-2; The Methodist Episcopal Church *v. Jacques* (opinion by Kent), 3 Johns. Chancery, 77; the overruling opinion by the Court of Errors, 17 Johns., 548; *Yale v. Dederer*, 22 N. Y., 450; 18 N. Y., 265.

course become a lien, upon a well-founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase-money.

"But no other kind of debt can, as it seems to me, be thus charged, without some affirmative act of the wife evincing that intention; and there is no reason why her acts in this respect should not be tested by the same principles and rules of evidence, which are applied to similar questions in other cases."

Cases hold that no evidence, to show the intent to charge, is admissible, except what appears in the instrument, while others hold that, while the intent to charge must appear, it is sufficient, even if it be by parol evidence, though the debt or other contract is like, for instance, a promissory note, in writing.*

Others hold that there can be no charge on the separate estate, except by *express* agreement,† and some of the cases say, with the trustee or husband.‡

This requirement of an *express* agreement is all right where the contract is not for the benefit of the wife, but where it is for the benefit of the estate, it should be presumed to be a charge upon the same. On this point, Mr. Bishop says: "It is believed to be the universal doctrine, if anything on this subject can be said to be so, that when a married woman contracts for the benefit of her separate estate, and the contract is silent as to the source of payment, it will be presumed to be a charge on such estate."§

The Wife's Promissory Note.—I suppose in most of the States it is held that the promissory note of a *feme covert* in the usual form, as if she were a *feme sole*, does not charge her separate estate.||

Even in the State of New York, where it is so often said in general terms that, as to the separate estate, the wife can act as a

* Conn. v. Conn, 1 Md. Ch., 212; Koontz v. Nabb, 16 Md., 549, 554; 1 Bishop, L. M. W., §§ 875, 876.

† Cherry v. Clements, 10 Hump. (Tenn.), 552.

‡ Felton v. Reed, 7 Jones (N. C.), 269; Harris v. Jenkins, 72 N. C., 183.

§ Bishop on Law of Married Women, § 875; Frazier v. Brownlow, 3 Ire. Eq., 237; Gardner v. Gardner, 22 Wend., 526; Paley v. Lent, 5 Bosw., 713; Dyett v. North American Coal Co., 20 Wend., 570; Franklin v. Beatty, 27 Miss., 347.

|| Litton v. Baldin, 8 Hump., 209; Pippen v. Wesson, 74 N. C., 437.

feme sole, it seems that the court still recognizes many of the disabilities of coverture. But a different doctrine has been held in some of the States.* The effect of these holdings, generally, is that a debt contracted by a married woman is *prima facie* evidence to charge her separate estate. It is said in one case: "Where the *feme covert* executes a bond or note, or accepts a bill, it is held that she must intend by such instrument to bind her separate estate, because these acts would otherwise be nugatory, and these instruments could in no other way have any validity or operation."† And this is held to be so where the promissory note is the joint one of husband and wife.‡

It has been held in Alabama, that the wife's note, like any other, is good in the hands of an indorsee, who may proceed in equity to enforce its payment out of the separate estate.§

What is the Equity Principle in these Cases?—Courts of equity have jurisdiction over trusts, and the separate estate is a trust-fund. The court of equity should supervise the execution of the trust in each particular case. If the wife (*cestui que trust*), not being restrained, has made such a contract, or incurred such a liability as ought in conscience to constitute a charge on the separate estate, equity will enforce it as such. And, as a matter of reason and principle, it is not necessary that the intent to charge should be expressly stated in the instrument creating the equitable debt, if such can be made to appear by other competent evidence.|| And why should not the circumstances, the acts, and declarations of the parties, especially matters *res gestæ*, be considered competent evidence?

The mere fact that the debt is for the benefit of the separate estate raises a presumption of a promise to pay. Now why may not other facts existing in parol be competent evidence?

If the contract is *not* for the benefit of the estate, and yet the liability is to *exist* by showing a *contract* and *intent* to charge,

* *Legond v. Garland*, 23 Mo., 547; *Cowles v. Morgan*, 34 Ala., 535; *Dobbin v. Hubbard*, 17 Ark., 189; *Bell v. Keller*, 13 B. Mon., 381; *Greenough v. Wissington*, 2 Greene (Iowa), 435.

† *Coats v. Robinson*, 10 Mo., 757.

‡ *Caldwell v. Sawyer*, 30 Ala., 283.

§ *Baker v. Gregory*, 28 Ala., 544.

|| *Bishop on Law of Married Women*, § 876.

what reason can be assigned against the resort to the ordinary rules of evidence used in analogous cases, and in questions involving the same principles?

A party does an act, and the question is, What was the *intent* in this act? The rules of evidence afford the means of ascertaining this intent. So a married woman contracts a debt, in which contract nothing is said as to how it shall be paid. It would seem that many pertinent facts might be shown as evidence of the intent to charge the separate estate (even where not for the benefit of the estate), such as the fact that she *owned* a separate estate; that she made declarations at the time, or at a subsequent time, indicating the intent. The giving of a note as a *feme sole* should be some evidence *tending* to show this fact, if not *prima facie*, as held by some of the cases already reviewed. The evidence is not allowed in either case to fix the wife's personal liability in *law*; for *this* purpose both kinds of evidence are irrelevant, because of her own exemption from *legal personal* liability. But the wife's separate estate is generally held chargeable in a court of equity, on the presentation of such a state of facts as will create an equity in favor of the party seeking the debt or the execution of the obligation. These facts may appear by writing or by parol, or both.

A married woman becomes the debtor of her husband by borrowing money of him for the benefit of her separate estate; and the debt will be enforced as a lien upon her estate.* Her coverture is no impediment to charging the separate estate in favor of the husband as in favor of third persons.

Speaking of the interposition of a court of equity in this regard, it should not be forgotten that there may be a wide difference between what the *feme covert* has capacity to do under a power contained in a settlement, and what the rule of equity in the absence of the power permits.

"The settlement has the potency to decide every question for itself, however contrary the decision may be to the rule which the law would otherwise furnish."†

* *Gardner v. Gardner*, 22 Wend., 526; *Leavitt v. Pell*, 25 N. Y., 474; *Whitesides v. Carman*, 23 Mo., 457; *Cowles v. Morgan*, 34 Ala., 535; *Yale v. Dederer*, 22 N. Y., 450; *Gardner v. Gardner*, 7 Paige, 112; *Brundrige v. Poor*, 2 Gill & J., 1.

† *Bishop, Married Women*, §§ 845, 846.

Statutory Separate Estates.—Most of the States have either passed statutes or constitutional provisions, giving the wife something like a *separate estate*. These laws take the place of a deed of settlement.

The effect of these statutes may be to convert the equitable estate into a *legal* estate in the wife, dispensing entirely with the trustee. But holding, as she does technically, the legal estate under these statutes, yet it has the *qualities* of a *separate estate*, as understood in the unwritten law. She is not endowed with *unlimited* right of disposition. On this point I shall utilize what Mr. Bishop* says:

“Now, in matter of principle, if a statute simply provides that the wife’s property shall be held by her as separate statutory estate—that is, shall be held to her separate use, while yet the legal title vests in her, this does not enable her to bind her person, either at law or in equity, by a contract, or subject her to be sued at law; and, therefore, she must be capable of charging such estate in equity the same as though it were held by a trustee under the unwritten law, for the same reason applies to the one case as to the other.”† The statute does not remove any of the disabilities of coverture.

Most of these statutes are of a recent date, and passed after the court of equity had built up a system of procedure and rules by which the separate estate should be controlled, and no doubt they should be construed by the courts in harmony with the unwritten law and the rule of natural reason.

The various rules of statutory interpretation to be found in the books will apply to these various statutory and constitutional regulations regarding the separate estate the reasoning of the Supreme Court of North Carolina on this point in the recent case of *Pippen v. Wesson*, *supra*. In that case the suit was on a note executed by the wife jointly with the husband, and it was contended that the effect of the Constitution of 1868 in creating a separate estate‡ was to enlarge the wife’s capacity to contract.

* Bishop’s Law of Married Women, vol. ii., §§ 202, 204.

† See *Pippen v. Wesson*, 74 N. C. 437 (as to the N. C. statute); 2 Bishop, Married Women, §§ 26, 66–68.

‡ See Constitution of N. C., 1868, art. 10, sec. 6; Acts of 1871–2, Battle’s Revisal, sec. 17, p. 590.

And to sustain this view, Mr. S. F. Phillips (now United States Solicitor-General) in the argument relied on the dictum in the case of *Withers v. Sparrow** to sustain this position.

The court says: "It will be seen upon an examination of the legislation referred to, that it by no means converts a married woman into a *feme sole* in respect to her separate estate, but that it gives special powers, which are carefully limited and defined, and that outside of such powers her disability remains as at common law."

The court further says, in *Pippen v. Wesson*: "It is true, that when the decisions to which I have referred were made, the separate estate of the wife was a mere equity, the legal estate being vested in a trustee, and that since the Constitution of 1868 she has the legal estate to her separate use. But that change has not removed her legal disabilities to contract, or extended her ability in equity. Her contract by bond is still void at law, and the courts, under their equitable powers, will not enforce it against her separate estate unless the creditor has an equity to have it enforced; that is to say, unless it was for her benefit." They say that the terms "sole and separate estate" had a well-known and definite meaning, and the convention and legislature used those terms in the sense in which they were understood by the profession at the time. Allusion having been made in another place to this decision on this point, it will not be further pursued, except to say that the reasoning of that case commends itself greatly, and worthy of acceptance in the construction of most of the recent statutes regarding the separate estate. The courts of Wisconsin, too, have made similar decisions. They say, "The change from an equitable to a legal estate has not, with respect to them, enlarged her powers or removed the disability of coverture, but she remains as if still possessed of an estate in equity without restriction as to her power of disposition."†

The court of New Jersey says, pertinently: "The jurisdiction of a court of equity over the subject does not rest upon the ground that the estate of the wife is an equitable estate merely, but upon the ground that it is her *separate* estate, which is equitably subject to contracts and engagements entered into by

* *Withers v. Sparrow*, 66 N. C., 138.

† *Wooster v. Northrup*, 5 Wis., 245. See *Todd v. Lee*, 15 Wis., 365, 380.

her, which are not *legally* binding upon her personally, and which cannot be enforced at law. Whether the estate of the wife is vested in a trustee, her interest being merely equitable, or whether the estate is vested directly in her, so that she has both the legal and equitable interest, is immaterial."* Mr. Bishop has discussed this question fully and collated the authorities upon this point.† And the second volume of Mr. Bishop on the *Law of Married Women* is devoted to the legislation of the different States and the interpretation of the courts in reference to the separate estate, the examination of which is commended by the author.‡

We conclude, therefore, that the equitable doctrine extends to the *statutory separate estate*. Indeed, these statutes might be considered as so many deeds of settlement, each to apply to the married women of an entire State, not of course to have a retrospective operation.§

In Georgia, however, under the statutes of 1866, and by virtue of the power to contract under the Constitution, it has been held, that if the wife buys property, and gives her individual note for the price, she is presumed to have a separate estate and to contract in reference to it.||

There are many instances where the statute expressly, or by implication, establishes a rule different from the equity rule in which the statute must prevail.

The English Doctrine again.—Although the English, from a very early period, departed from the common-law rules in admitting the wife to be considered as a *feme sole* as to the trust

* *Johnson v. Cummins*, 1 C. E. Green, 97, 105. Similar reasoning: *Peak v. La Baw*, C. E. Green, 269, 282. Consult *Armstrong v. Ross*, 5 C. E. Green, 109, 114.

† *Bishop, Married Women*, § 204. For the construction similar to North Carolina and New Jersey and Wisconsin, see *Ballin v. Dillaye*, 37 N. Y., 35; *Murray v. Keys*, 11 Casey (Penn.), 384; *Kim v. Weippert*, 46 Mo., 532; *Hooper v. Smith*, 23 Ala., 639; *Wicks v. Mitchell*, 9 Kan., 80; *Smith v. Howe*, 31 Ind., 233; *Patten v. King*, 28 Tex., 685.

‡ See the several rules of interpretation of these statutes: §§ 59, 60, 61; 62, 63, 64, 65.

§ This is the result of the decisions in California. See *Miller v. Newton*, 23 Cal., 554, 564; *Maclay v. Love*, 25 Cal., 367. The recent Delaware statutes of 1875 are subject to like construction.

|| *Huff v. Wright*, 39 Ga., 41. As to other circumstances and prior to late enactments, see *Meredith v. Hughes*, 23 Ga., 571.

separate estate, this only included the power to *act as a feme sole*, *quoad* the capacity of *enjoying* and the capacity of disposing of the same. It did not allow the other capacity of a *feme sole* to *contract debts*.*

In the course of time, however, the courts of equity, being impressed with the injustice of allowing the wife, after solemnly and deliberately making an engagement for the payment of money, to continue in the enjoyment of the separate property without paying her creditors, did decree, first, that if she gave a bond under seal (then extended to promissory notes and all written contracts), then the separate estate should be held chargeable. The English courts were greatly indisposed to charge the separate estate in favor of a mere verbal agreement, or other common *assumpsit*.

On this point Peachey further says: "The inconsistency, however, of drawing a distinction between the different engagements of a married woman having separate estate, with reference to the different forms in which they are contracted, together with the unsatisfactory character of the reasons assigned to justify such distinctions, has forced itself more and more on the attention of successive judges, and a growing tendency has been manifested to adopt a more consistent course, by holding, first, that to the same extent to which a married woman is, by courts of equity, constituted a *feme sole* with respect to the capacity of enjoying and the capacity of disposing of property, she ought also to be regarded as a *feme sole* with respect to the capacity of contracting debts, or engagements in the nature of debts; and, secondly, as a corollary of the former, that all such debts or engagements should stand on the same footing, in whatever form contracted. And it may now be considered to be the doctrine of courts of equity that the engagements and contracts of a married woman having property settled to her separate use—at least such of them as are in writing—are to be regarded as debts, or in the nature of debts; and that her property so settled is liable to the payment of them as such; and that this principle is entirely founded on the general doctrine of courts of equity, by which, as has been seen, she is constituted a *feme sole* with respect to that separate property.

* Peachey, Mar. Set., 269, *et seq.*; Vaughan v. Vanderstegen, 2 Drewry, 180; Newcomer v. Hassard, 4 Irish Ch., 274.

It has not yet, indeed, been made the subject of positive decision that the principle embraces her verbal engagements, or cases of common assumpsit; but it is very probable, as has been recently intimated by the vice-chancellor, Sir Richard Kindersly, that when that question arises for decision it will be decided in the affirmative."

Since the writing of Peachey the judicial decisions in England have tended in the direction intimated by him.

In 1868 it was said that, "If a married woman, having separate estate, enters into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and, in entering into such engagements, she purports to contract, not for husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she was contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable. And the question whether the obligation was contracted in the manner I have mentioned, must depend upon the facts and circumstances of each particular case."* Commenting on these principles and decisions Mr. Bishop, vol. i., § 862, says:

"Therefore, if a married woman, having a separate estate, contracts a debt, not on her husband's account, but on her own, and is silent on the question, whether or not she means it to be a charge on her separate estate, the law should presume the latter, rather than presume an intention to cheat the other party to the contract."

From these views we may conclude that the equity doctrine as administered finally in England is, that the wife is, in all respects, to be regarded as a *feme sole* as to her separate property, where the deed of settlement does not in terms, or by implication, place restraints upon her. But this doctrine would not allow her to be sued at *law*; she could not make a contract binding in

* Mathewman's case, Law Rep., 3 Eq., 781; Butler v. Cumpston, Law Rep., 7 Eq., 16, 20, 21; Johnson v. Gallaher, 3 De G., F. & J., 494; Shattock v. Shattock, Law Rep., 2 Eq., 182, 186, 187.

This latter case indicates that the contract need not be in writing. The principle on which the reasoning goes would say that in this way she is liable, although not for the benefit of the separate estate.

law even in respect to her separate estate; her person could not be arrested; no judgment against her person could be rendered. Equity, however, could lay hold of her separate estate both during life and after her decease to satisfy such debts and obligations as would be against conscience to refuse relief.* And, indeed, notwithstanding all the loose *dicta* and diversified reasonings about the *separate estate*, *feme covert*, and *feme sole*, when we come to the question of the power and practice of a court of equity in charging the separate estate with the wife's debts and obligations, the English and the leading American decisions amount to about the same thing. The application of the equity doctrine to particular statutes may cause a difference in the holdings. The State, with a legislative mania for law reform, and especially for changes in regard to married women, will have adjudications following the legislative *intent* of enlarging the powers and capacities of the wife owning separate property (and all of her property is separate estate now in most of the States). This class of decisions will say, if the contract is made in reference directly, or by necessary implication, to the separate estate, it is held chargeable, whether the debt was for the benefit of the wife or of another; while in those States, as in North Carolina, where, although she has the *sole separate estate*, the disabilities of coverture are retained and limitations imposed in the statute, the courts in "doing equity" will only *charge* the separate estate for those debts and obligations of the wife which will appear for her *benefit*, or the *benefit* of the separate estate. And the continual reference to the distinctions between the English and American doctrine tends to confusion rather than otherwise. In England, now, the wife *conveys* by deed, which takes effect on enrolment; in America she conveys by deed, properly executed, effectual on registration; but when a court of equity interferes to grant relief and to prevent fraud and injustice, the reasons, principles, and results are very much the same.

Even in North Carolina, if the requirements of making a deed are followed, and a privy examination had, the wife can *convey*

* We have seen that, by the broad statutes of New York, a personal judgment may be rendered against the wife and execution levied upon her separate property: *Law*, 1862-3 (see reference to N. Y. decisions).

her separate estate for *any* consideration she pleases, even to pay the debt of *another*. This by virtue of the statutory power.

But before a decree in equity, which may result in a *conveyance*, will be made, the courts, exercising the powers of a court of chancery, will require a *different consideration*; that is to say, the wife being under known and recognized disabilities, this separate estate, intended for *her* benefit, should not be allowed to pass from her except for a consideration for her benefit.* And this is certainly the safest rule to protect the *feme covert*. The reasons given by Judge Pearson in the dissenting opinion to the case of *Harris v. Harris*† are replete with incontrovertible principles.

This opinion of Judge Pearson, and the great argument of Chancellor Kent, while Chancellor of New York, in the great case of *The Methodist Episcopal Church v. Jacques*, *supra*, have, perhaps, had more influence in *guarding the interest* of the married woman than any other two cases in the country. And yet one was a *dissenting* opinion, and the other *overruled* by the Court of Errors for New York. *Subsequent* decisions, however, followed these cases, within those States especially, rather than the *majority* opinion.

The limits of this work will not allow a further elaboration of these interesting questions; and the author trusts, that the practitioner, in a controversy between the *creditor* and *married woman*, whether he represents the *one* or the *other*, may find much in this chapter to assist him in determining the "*law of the case*."

* *Pippen v. Weason*, 74 N. C., 437, where this point is left an open question.

† *Harris v. Harris* (Pearson's dissenting opinion), 7 Ire. Eq., 120.

CHAPTER XVII.

CONVEYANCES AND DEALINGS BETWEEN HUSBAND AND WIFE.

In the case of *Sexton v. Wheaton*,* Mr. Chief Justice Marshall, in delivering the opinion of the court, says: "It would seem to be a consequence of that absolute power which a man possesses over his own property, that he might make any disposition of it which did not interfere with the existing rights of others; that such disposition of it, if it were fair and real, would be valid; that a voluntary settlement by a husband in favor of his wife could not be *impeached by subsequent creditors*, unless it was made to defraud them."

This was a case from the District of Columbia. The husband (with his own money) purchased a house and lot in the District of Columbia, took the conveyance in *the name of his wife*, and afterwards *improvements* were made upon the property. Subsequent creditors, having obtained judgment against him, filed a bill to subject the property, contending that the deed was void as to creditors, and praying *that, if the conveyance was sustained, the wife might be compelled to account for the value of the improvements*. But the court held: "That the husband at the time being free from debt, the conveyance to the wife was to be deemed a voluntary settlement upon her, which, not being made with any fraudulent intent, was operative and binding against subsequent creditors; that the improvements put upon the property stood upon the same footing as the conveyance itself, they being made before the debts were contracted."

In *Jackson v. Jackson*,† the same doctrine is held. The deed had been taken in the wife's name, but paid for by the money of the husband. The court says: "That, although the money was the property of the husband, it was competent and lawful for him to allow her to invest it for her own use, so as to be beyond his reach and control, being at the time free from debt." On behalf

* 8 Wheat., 229; *Guthrie v. Gardner*, 19 Wend., 414; *Perry on Trusts*, § 143; *Picquet v. Swan*, 4 Mass., 414.

† *Jackson v. Jackson*, 91 U. S. (1 Otto), 122.

of creditors, it was contended that in this case there was a resultant trust in favor of the husband, as *he* furnished the money, but the court says: "No presumption that a personal benefit was intended to the party advancing the funds for a purchase in the name of another can arise where an obligation exists on his part, legal or moral, to provide for the grantee as in case of husband for his wife, or a father for his child. This rebuts the presumption of a resultant trust."

The deed from husband to wife may be of two kinds:

1. A voluntary conveyance.
2. A conveyance founded on a valuable consideration.

If the husband and wife conform to the principles which regulate their dealings with each other, they can make any property arrangement between themselves which they choose, and it will be binding, not only *inter se*, but upon all other persons who claim under them.* But the controversy, which most usually results from these conveyances and contracts between husband and wife, is brought about by the creditors of the husband. A "man is bound to be just before he is generous;" therefore, he cannot with impunity convey his property to his wife or child on a mere meritorious consideration, if it affects the rights of creditors then in existence.

In the reign of Queen Elizabeth two famous statutes† were passed in England.

The statute of 13 Elizabeth, ch. 5, had the effect to make all conveyances, whether of real or personal property, void as to *creditors*, if in any way intended to "*hinder*," "*delay*," or "*defraud*" them. The statute of 27 Elizabeth, ch. 4, is not for the protection of *creditors*, but subsequent *purchasers*, and applies only to real estate.

These statutes were really but little more than a declaration of what the common law was before, and they have been substantially re-enacted in most of the States.‡

Of course, if the deed from husband to wife is founded upon a valuable consideration, she is protected like all other purchasers,

* 1 Bishop on Law of Married Women, § 735.

† 13 Eliz., ch. 5, and 27 Eliz., ch. 4. This statute may be found in Burrell on Assignments, 396, and other works, and will not be copied in this work.

‡ 4 Kent's Com., 436; Fullenweider v. Roberts, 4 Dev. & B., 278.

especially under the American statutes, granting to her all her property as a sole and separate estate. The release of inchoate dower is a sufficient consideration to sustain a deed from husband to the wife. If he get her separate estate, he becomes her debtor, and the debt may be discharged in the conveyance of real estate. If the complaining creditor seeks to avoid the deed made to the wife, he must charge the same in his bill of complaint, and establish the fraud under the rules and practice of the court, and where the statute makes the deed void in a court of law, the *badges* and circumstances which tend to establish the *fraud* must be shown.

Under the strict rule of the common law, the wife was incapable of contracting, but this rule was subject to certain exceptions, when the principles of the rule could not be applied, and when reason and justice dictate a departure from it.* “She might, by a fine, and a declaration of the uses thereof, decree a use for her husband’s benefit.” She might make a conveyance to her husband through a third person, to whom the wife first conveys, and who then conveys to the husband.

A court of equity looks with jealousy and suspicion at gifts from the wife to husband, yet they will be supported, if done freely and voluntarily.†

The husband, in equity, often becomes the *trustee* of the wife; thus, if property be settled on the wife to her separate use, and no trustee be appointed, the Court of Chancery would protect her interest against the creditors of the husband, and the husband, if he gets possession of the same, held chargeable as trustee, notwithstanding he was not a party to the instrument under which the wife claims. Since the numerous statutory regulations, enlarging the capacity of the wife to hold property, husband and wife may convey to each other, and have contracts enforced very much as other persons, the delicate relation always having its force and bearing when *fraud* is alleged as to third persons.

The husband is sometimes the *agent* of the wife in regard to real property. Thus, where he purchased a tract of land but gave his own note and took title in his own name, the greater part of the purchase-money being paid out of the wife’s funds, and the husband afterwards conveyed the land to his sons in trust for the

* 2 Kent, 150.

† Hill on Trustees, 666 (note 1); Jacques v. M. E. Church, 17 John. R., 548.

wife, the wife is entitled to demand a conveyance to herself on the payment of the balance of the purchase-money, and an injunction to restrain the vendor from selling the same under execution to satisfy an independent claim held by him against the husband.*

It is true, however, as a general rule, that the court will not enjoin a sale under execution, if under it merely a case of conflict of legal titles was created.†

But where the party, seeking a restraining order or injunction, is asserting a mere *equity*, the rule is different, and this upon the principle that, when a cause is duly constituted in a court of equity, that court will make a complete and final adjudication of all rights affecting the subject-matter of the action, and to this end will require the parties to set up all their rights, whether equitable or legal, so as to be bound by the decree, and will restrain any act of a party tending needlessly to increase the complications of the controversy. In the case of *Southerland v. Harper* the general rule is given where there is a conflict of legal title. In that case the party in possession had bought the land, as he alleged, *bona fide*; but the creditor of the vendor obtained judgment against him, treating the conveyance as fraudulent, and was about to sell under execution, when the party in possession (the vendee) sought to enjoin the sale under execution, which was refused by the court. The vendee based the relief upon the allegations that the land was purchased and paid for before the rendition of the judgment against the vendor; and that, if the sale is permitted, it will greatly embarrass the plaintiff, and cast a cloud on the title, and do irreparable injury. The relief was refused, for the reason that if the deed was *bona fide* and without fraud, it was entirely good against any title obtained by execution sale against the vendor not based on a prior lien; but if fraudulent under the statute of Elizabeth, the title remained in the vendor and subject to creditors, and this could be shown in an action to recover the land by the purchaser at execution sale. In this state of the case, the vendee being in possession under his

* *Cunningham v. Bell*, 83 N. C., 328; *Dockery v. French*, 69 N. C., 308; *Dula v. Young*, 70 N. C., 450; *Lyon v. Aiken*, 78 N. C., 258; 2 *Spence's Eq.*, 660.

† *Southerland v. Harper*, 83 N. C., 200.

deed, and the purchaser at execution sale claiming the land, neither could file a bill against the other in order to remove a cloud, but it is a case of conflict between legal titles. There might be an instance where a purchaser at execution sale would fail speedily to assert his title by action, and use it to impair the value of the land in the sale of it or otherwise, in which a court of equity would grant relief by compelling the purchaser to submit to an adjudication of the rights under the idea of irreparable mischief and to remove a cloud.

Marriage Settlements.—These contracts, says Judge Kent, “usually proceed from the prudence and foresight of friends, or the warm and anxious affections of parents, and, if fairly made, they ought to be supported, according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intentions of these settlements into effect, and not permit the intention to be defeated.”*

The term, marriage settlement, is frequently applied to antenuptial contracts only; but these settlements are either antenuptial or post-nuptial.

The statute of frauds, section 4, requires that promises and agreements in consideration of marriage shall be “in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

In all these marriage settlements the marriage affords a sufficient consideration, which is, in fact, the highest consideration known to the law.† Therefore a man could not set aside an agreement in contemplation of marriage merely because his wife’s fortune fell below his expectations.‡

In this country almost any *bona fide* and reasonable agreement made before marriage, to secure the wife either in the enjoyment of her own property, or a portion of that of her husband, whether during coverture or after his death, will be enforced in chancery.§ On this point Mr. Schouler says: “The consideration of mar-

* 2 Kent Com., 165.

† Schouler’s Domestic Relations, 262; Peachey, Mar. Settl., 56; Nairn v. Prouse, 6 Ves., 752.

‡ Ex parte Marsh, 1; Atk., 159; Ford v. Stuart, 15 Beav., 499.

§ Stilley v. Folger, 14 Ohio, 610; Story’s Eq. Jur., §§ 983-997.

riage will support the settlement against creditors; this, too, it would appear, though the parties both knew of the husband's indebtedness, so long as the provisions of the settlement were not grossly out of proportion to his station and circumstances. But if it appears that the celebration of marriage is part of a scheme to defraud and delay creditors, such settlement will not be allowed to protect the property."* There is a distinction in a court of equity as to the parties in whose favor the provisions of marriage articles will be specifically executed or not. They will not generally be enforced in favor of mere volunteers, but the parties seeking the specific execution of the articles may be those strictly within the reach and influence of the consideration of marriage, or claiming through them, such as the wife and issue, and those claiming under them; or they may be mere volunteers, for whom the settler is under no natural or moral obligation to provide, and yet who are included within the scope of the provisions in the marriage articles, such as his distant heirs or relatives, or mere strangers.†

The Settlement after Marriage, according to Agreement before Marriage.—Mr. Schouler says it is well settled that, if the agreement before marriage is reduced to writing, then the settlement made after marriage, in pursuance thereof, the consideration is deemed valuable, but doubts the *dicta* of some of the cases, which hold that a settlement after marriage, reciting a *parol* agreement before marriage, was sufficient in law. But Judge Story, in his *Commentaries on Equity Jurisprudence*, cites many cases where it has been held that the settlement reciting a *parol* agreement before marriage was not void as to creditors. He says: "It has always been considered that the wife, so long as her property was kept separate, and especially where this was done in pursuance of an ante-nuptial *parol* agreement between herself and her husband, which had been reduced to writing subsequent to the marriage, had an equity which the courts of equity would enforce against the creditors of the husband."‡ The case of *Worden v.*

* Schouler's *Dom. Relations*, 264; *Campion v. Cotton*, 17 Ves., 272; *Goldsmith v. Russell*, 5 De G., M. & G., 555; *Peachey, Mar. Settl.*, 63.

† Story's *Eq. Jur.*, § 986; *Neves v. Scott*, 9 How. (U. S.), 196; 13 How. 268; *Wallace v. McCullough*, 1 Rich. Eq., 426.

‡ Story *Eq. Jur.*, § 987.

Jones,* which held the settlement void when made on a parol agreement before marriage, is thought by Judge Story as trenching very essentially upon the principles of some of the earlier cases, and this case has been questioned in England.† The tendency of the courts in this country is favorable to settlements after marriage; in pursuance of informal prior agreements.‡

Mr. Schouler refers to the fact, that the American rule is favorable to marriage articles, although unskilfully drawn, so long as they are *bona fide* articles.§

The Promise by a Third Party.—A third party—for instance, the wife's father—may be compelled to perform a promise made in consideration of marriage. But, in order that the husband enforce this contract, it must appear that he (the husband) knew of the promise, and that it entered as an ingredient into the marriage. But in the case of the husband, after marriage, he found that his wife had received a letter, while single, from her father, promising a certain allowance; the promise could not be enforced by the husband, for the reason that it was no part of the inducement to the marriage contract.

A Settlement by a Woman in Fraud of her intended Husband.—If a woman, while engaged, and in contemplation of marriage, shall convey or settle her property on a third person in a secret manner, intended to defraud the husband of his marital rights, equity will set the same aside at the instance of the husband. The husband must have been kept in ignorance of the transaction up to the moment of the marriage, for if a man, knowing what has been done, still thinks fit to marry the woman, he cannot afterwards allege that he had been deceived.|| The English and American courts have, in numerous cases, as shown by the cita-

* Worden v. Jones, 2 De G. & J., 76.

† See London Jurist, Feb. 12, 1859. See Merrill's Administrator v. Merrill's Heirs, 32 Vt. R., 27. But see Croft v. Wilbor, 7 Allen, 248.

‡ Livingston v. Livingston, 2 Johns. Ch., 481; Resor v. Resor, 9 Ind., 347.

§ Schouler, D. R., 267; Neves v. Scott, 9 How., 196; Hooks v. Lee, 8 Ire. Eq., 157; Rivers v. Thayer, 7 Rich. Eq., 136; Kinnard v. Daniel, 13 B. Mon., 496; Montgomery v. Henderson, 3 Jones Eq., 113; Potts v. Cagdoll, 1 Des., 456.

|| Schouler, Domestic Relations, 269; Peachey, Mar. Settl., 145, and cases cited; St. George v. Wake, 1 Myl. & K., 610.

tions by Mr. Schouler, afforded relief to the husband on the grounds of a conveyance, before marriage, to defeat the rights of the husband. The facts which constitute fraud in ordinary conveyances often appear in these transactions. Each case depends upon its peculiar facts. For instance, if the conveyance by the woman was prior to the beginning of the courtship, it would be more difficult to show a fraudulent intent; the husband must show that the conveyance was in contemplation of the marriage with him.

The courts sometimes are invoked to reform settlements made upon ante-nuptial articles, and these articles may be set up against the settlement, upon the idea that the articles before marriage embrace the intentions of the parties. The intended husband cannot make a settlement on the wife, so that, in the event of his future insolvency, the wife shall take the property; this would be a fraud on creditors. But the wife's fortune may be settled on her husband till he fail, and then to her separate use.*

If the marriage settlement is valid, according to the laws of the State where made, it is valid in any other State to which the domicile of the parties may be removed, or the property or its proceeds carried.† In the case of *Hicks v. Skinner*, the marriage settlement, executed and registered in New York, and the property removed to North Carolina, the domicile of the husband, was held valid, although not registered in the latter State; and the rights of the wife were held superior to those of the creditors of the husband, although the property had been changed from what it originally was.

But it may be said that the recent legislation and, in some instances, constitutional provisions in many of the American States, have dispensed with the necessity and reason for these ante-nuptial contracts. This American policy to dispense with trusts, and place the married woman's separate property in her own absolute control, has superseded these contracts to a considerable extent. Under these statutes, if the woman has property, either real or personal, before marriage, or shall obtain the same after marriage, she has complete protection against the creditors of the

* Schouler's Domestic Relations, 274, 275, notes.

† *Hicks v. Skinner*, 71 N. C., 539.

husband, and she is enabled to fully assert her rights against the husband as though he were a stranger.

These statutes not only deprive the husband of the common-law marital rights, as to personal property, but many of them have destroyed the *curtesy estate* in her real property. These marriage settlements were more common in England among parties of vast means, but not so generally in the United States. Perhaps New York and the Southern States have adopted these settlements to a considerable extent in time past.

Post-nuptial Contracts.—This term, post-nuptial settlement, is used in the text-books without much advantage to the student. For a post-nuptial settlement, not based on articles or contract before marriage, is nothing but a contract between husband and wife, or a gift which, if made without prejudice to the rights of others, the courts of equity will enforce and sustain.

Then, again, if the settlement is made *after* marriage, in pursuance of articles executed *before* marriage, this is not a post-nuptial settlement, but the final execution of the ante-nuptial settlement, based alone on the consideration of marriage. It is the high consideration which enters into these contracts (to wit, marriage) that gives them a peculiar and favored position; but a contract or gift from husband or wife *after* marriage has none of the elements of an ante-nuptial settlement, except, perhaps, the peculiar relation of husband and wife—certainly no consideration that will bind the creditors of the husband or wife. So the calling of a contract post-nuptial adds but little to the idea involved in these transactions.

These contracts and gifts, after marriage, for the want of a consideration, are deemed voluntary, yet all voluntary deeds are binding on the parties; but others (creditors, for instance) may impeach them as fraudulent under 13 Eliz., chap. 5. Or it may be that subsequent purchasers of lands may have the same declared fraudulent under 27 Eliz., chap. 4.

These two statutes are intended to protect creditors and purchasers. The statute of 13 Eliz. is directed against the fraudulent conveyances of all property, while the statute of 27 Eliz. only protects subsequent purchasers of real estate from any fraud intended to defeat them.

Post-nuptial Contracts based on a valuable Consideration.—The contracts which are void as to creditors are those deemed voluntary, or made with intention to “hinder and delay creditors.” In other words, the mere moral obligations to the wife are not a sufficient consideration to support the gift in all cases, except *inter partes*. But if there be a valuable consideration, then, in the absence of *intended* fraud, the contract is sustained in a court of equity, and, perhaps, in all the courts in those States where she is the *sole* owner of the property and contracts in the manner directed by statute. Take this instance,—the wife has a *separate estate*, the husband may convey to her property in consideration of payment from this separate estate. So where he has used and appropriated a like amount of his wife’s property, without her consent, or a release of inchoate dower, or the wife’s relinquishment of her equity to a *chose in action*.*

It is not in the province of this chapter to discuss the doctrine of fraudulent conveyances generally between man and man, but only those contracts between husband and wife. This statute of 13 Elizabeth, ch. 5, being generally adopted in the United States, is considered an affirmation of the common law. The statute of 27 Elizabeth, ch. 4, is a part of the common law brought to this country by our ancestors, though it is said not to be adopted in this country to the full extent of equity decisions.†

The English and American doctrine is quite different on the construction of 27 Elizabeth. The English rule is this: If a deed is merely for a meritorious consideration, or voluntary, it shall be deemed fraudulent as to a *subsequent* purchaser of the land for a valuable consideration, even though he had notice of the voluntary deed.‡

This rule, it was said, might well be doubted in its application to subsequent purchasers with notice, but Lord Thurlow said, in

* *Simmons v. McElwain*, 26 Barb., 420; *Bullard v. Briggs*, 7 Pick., 533; *Ready v. Bragg*, 1 Head., 511; *Teller v. Bishop*, 8 Minn., 226; *Poindexter v. Jeffries*, 15 Gratt., 363; *Wiley v. Gray*, 36 Miss., 510; *Unger v. Price*, 9 Md., 552; *Hale v. Plummer*, 6 Ind., 121; *Andrews v. Andrews*, 28 Ala., 432; *Babcock v. Eckler*, 24 N. Y., 628; *Townsend v. Maynard*, 45 Penn. St., 198; *Schouler, Dom. Relations*, 282, and (notes).

† *Schouler, Dom. Relations*, 280; 4 Kent, 463.

‡ *Doe v. Manning*, 9 East, 59; *Doe v. Rusham*, 17 Q. B., 724; *Evelyn v. Templar*, 2 Bro. C. C., 148; *Peachey, Mar. Settl.*, 228.

Evelyn v. Templar, that so many estates stand upon this rule that it cannot now be shaken. The principle on which the English courts held the doctrine was that, by selling the land over again for a valuable consideration, the vendor entirely repudiates the former deed or transaction, and shows his intention to sell, and the presumption against the prior gift is conclusive.

But, says Mr. Schouler:* "Fortunately, in this country, we have been hampered by no such severe construction of this statute, and, in a case before the Supreme Court of the United States, it was held that the principle of construction which prevailed in England at the commencement of the American Revolution, went no further than to hold the subsequent sale to be presumptive and not conclusive evidence of a fraudulent intent in making the prior voluntary conveyances, and the court declined to follow the subsequently established construction of Westminster Hall.

"And the better American doctrine seems to be that voluntary conveyances of land, *bona fide* made and not originally fraudulent, are valid as against a subsequent purchaser."†

But the doctrine is equally well settled that a *bona fide* purchaser is protected, whether he purchases from a fraudulent vendor or fraudulent vendee, and the same rule of construction applies to subsequent purchasers as to subsequent creditors, under *Elizabeth*, both being voidable rather than absolutely void. To establish the fraud, the circumstances and facts, which indicate the fraudulent purpose, must be shown in each particular case to the jury and the court.

If a marriage-settlement is made on a valuable consideration, the creditor can only impeach the same by showing that both husband and wife participated in the fraud.‡ "The contract is not the purpose of one, but the agreement of two minds," and of course both parties must intend the fraud. But, says the court, in *Lassiter v. Davis*: "A voluntary gift or settlement is void,

* Schouler, Dom. Relations, 281. He refers to *Cathcart v. Robinson*, 5 Peters's (U. S.) Reports, 280; 4 Kent, 463.

† To sustain this view, he cites the following authorities: 4 Kent, 464, notes and cases cited; *Jackson v. Town*, 4 Cow., 603; *Ricker v. Ham*, 14 Mass., 139; *Atkinson v. Phillips*, 1 Md. Ch., 507; *Beal v. Warren*, 2 Gray, 447; but *contra*, see *Clanton v. Borges*, 2 Dev. Ch., 13.

‡ *Lassiter v. Davis*, 64 N. C., 498; *Magniac v. Thompson*, 7 Peters, 348; *Howcot v. Collins*, 23 Miss., 398.

if it was the intent of the maker to hinder, delay or defraud, whether the party who takes the gift participated in the fraudulent intent or not.

“But an absolute conveyance for a valuable consideration is good, notwithstanding the intent of the maker to defraud, unless the other party participated.

“The fraud must enter into and affect the *contract*.”

This is but a reasonable doctrine ; if the contract is for a valuable consideration, then the parties to the contract have certain reciprocal rights among themselves, and the payment of a valuable consideration raises an equity, and these rights and this equity should not be impaired by the *intention* of one of the parties not communicated to the other.

But, in a voluntary conveyance, where the vendee pays nothing, no equity exists in his favor, which he can set up against an equity subsequently acquired by a *bona fide* purchaser for value, or a creditor who may have a prior equity.

In another place, where the general doctrine of fraudulent conveyances is discussed, much will be found to apply to these post-nuptial contracts of husband and wife.

The Rights of the Parties, under these Post-nuptial Contracts.—The husband may give to the wife, which is most common, but the wife may give to the husband. Since she owns most of the property *separate* now, instances more numerous will be found of gifts from the wife to the husband. Upon well-known reasons and principles it need only be stated here that gifts from wife to husband will be regarded with suspicion where the rights of third parties are involved, and sometimes *inter partes*. For the husband may use undue influence. In the first place, the court of equity will not regard these gifts, except the same are complete; the intention must clearly appear, and that intention must be executed.

If a trustee is introduced to support a settlement, this rule is more favorable to the *cestui que trust* claiming against the trustee. It is a general rule that all voluntary conveyances, though they may be void against creditors and purchasers for value, are binding on the grantor and those claiming under him.

It should be observed that a mere voluntary *promise* will not constitute a perfect gift. There should be either a clear, irrevoc-

cable gift to a trustee for the wife, or some positive act of the husband, which divests himself of the property, and holds it for the wife's separate use.* It was said, in *Wade v. Cantrell*, that a man cannot denude himself of his marital rights in property which the law vests in him, by simply declaring that it belongs to his wife. These remarks apply, however, mostly to transactions regarding personal property; in reference to land, if there be no writing, no question can be made, and, if there be a writing, the intentions of the parties are to be found therein. These mutual rights, growing out of contracts between husband and wife, founded on a valuable consideration, may be the subject of a specific performance by a court of equity; and, to illustrate this rule, Mr. Schouler gives the following:

"A husband and wife agreed by parol that he should purchase a lot of land in her name, and build a house thereon, and be reimbursed from the proceeds of the sale of another house belonging to her. The husband having executed the agreement on his part, the wife died suddenly before the sale of her house could be effected. She left infant children. It was decreed in equity that the agreement should be carried into effect; the former house was sold, a conveyance thereof executed by the infants by their guardian *ad litem*, and the husband be reimbursed out of the proceeds of the sale."† And, of course, a written contract, founded on a valuable consideration, in reference to real estate, might be specifically enforced under the same rules and principles which govern transactions between man and man. To make these contracts binding in strict law, a trustee is made for the wife, but equity will hold the same good between husband and wife, without the trustee. It is better to appoint a trustee, as the wife is not entirely free from disabilities, even under the most liberal legislation in the different States. A deed to the trustee always passes the legal title, and this permits suits relative to the property with more freedom. The wife's contract with the husband, in regard to her real estate, is more strictly construed,

* Schouler, 285, and note (2), in which many authorities are cited; see *Wade v. Cantrell*, 1 Head., 346.

† Schouler, Dom. Relations, 285-6; he refers in the note to *Livingston v. Livingston*, 2 Johns. Ch., 537; 6 Indiana, 418; *Jones v. Jones*, 18 Md., 464; *Steadman v. Wilbor*, 7 R. I., 481.

perhaps. A deed from the wife to the husband, especially if voluntary, is ineffectual and void. This rule may be changed by some of the married woman's acts, but in some of them this power is generally denied.*

If the wife is acting under a power, or the instrument under which she holds the property prescribes the mode of conveying the same, then, for a valuable consideration, she may, in the mode prescribed, convey to her husband.† So that, unless the wife convey under some power to dispose of the same, her disabilities are a bar, and, on her death, the land descends to her heirs; but, as to the personal property and the income of real property given to her separate estate, she has in equity a full power to dispose of them at her pleasure.‡

At common law, as a general rule, the unity of husband and wife renders all contracts between them a nullity. The husband could, in the absence of fraud on creditors, convey his lands to a third person for the use of his wife, and the wife (the husband joining with her) might convey her estate to a third person, and a deed from that third person to the husband would vest the title in him. But a deed for land made directly to the wife, is ordinarily void at law, yet courts of equity will, in many cases, uphold it as a settlement on the wife. Judge Story, in treating on this point, says: "If a husband should, by deed, grant *all* his estate or property to his wife, the deed would be held inoperative in equity, as it would be in law, for it could be in no just sense deemed a reasonable provision for her (which is all that courts of equity hold the wife entitled to), and, in giving her the whole, he would surrender all his own interest. But," says he, "on the other hand, if the nature and circumstances of the gift or grant, whether it be express or implied, are such that there is no ground to suspect fraud, but it amounts only to a reasonable provision for the wife, it will be sustained in equity."§

* *White v. Wager*, 32 Barb., 250; *Winans v. Peebles*, 32 N. Y., 423; *Graham v. Van Wyck*, 14 Barb., 531.

† *Story's Eq. Jur.*, § 1388 (notes); *Ibid.*, § 1391.

‡ *Story's Eq. Jur.*, § 1393; *Major v. Lansley*, 2 Russ & Mylne, 355.

§ *Story's Eq. Jur.*, §§ 1374, 1375. He refers to *Beard v. Beard*, 3 Atkins, 72; *Walter v. Hade*, 2 Swan. R., 106, 107; *Lucas v. Lucas*, 1 Atkins, 270.

This is the equitable doctrine on this point in both England and this country. Another instance in which the courts refuse to sustain a deed of this kind is where the wife's conduct had not been meritorious, but whose habits and character were such that a court of equity would not remedy a defective deed for her benefit, as in case of adultery and debased conduct.

As has been observed, at common law, a deed between husband and wife is void; but courts of equity, having a greater regard for the intentions and necessities of the parties, and, treating the deed as merely a defective conveyance, will uphold the same where the purpose of the husband is clear, and the gift itself appears to be no more than a reasonable provision for the wife.

The recent opinion of Judge Ruffin, in the case of *Warlick v. White*,* shows that the courts of North Carolina follow the English decisions on this point to the fullest extent of the doctrine. In that case the husband had made a deed to his wife conveying his *entire* property, in 1864, and then went to the war. The wife in the meantime gave birth to an illegitimate child of color, and it appeared that the wife had been guilty of adultery with a colored man. The court refused to sustain the deed on both grounds, of adultery, and being a disposition of the husband's *entire* estate.

But, as the married woman's acts have so greatly enlarged the capacity of the wife, it might be considered a failure to present the whole subject, if something more was not said in reference to grants by the wife to the husband. "There is a difference between a power of appointment, and property settled to the sole and separate benefit of the wife. The wife's disposition of her separate estate does not arise from the exercise of a power, but it is the exercise of a dominion over that estate unknown to the common law, and created by a court of equity, whose rules provide not only for her dominion over it, but also for the rights of those in favor of whom that dominion shall be exercised."†

* *Warlick v. White*, 86 N. C., 139 (note). To sustain the opinion reference is made to *Elliott v. Elliott*, 1 Dev. & Bat. Eq., 57; *Paschal v. Hall*, 5 Jones Eq., 108; *Carr v. Esterbrooke*, 4 Ves., 145; *Ball v. Montgomery*, 2 Ves., 189; *Watkins v. Watkins*, 2 Atk., 96; *Beard v. Beard*, 3 Atk., 72; *Roper on Husband and Wife*, 275; 2 Story Eq. Jur., § 1374.

† Schouler, Dom. Relations, 223 (note 3).

The right to enjoy property carries with it, as a necessary incident, the right of free disposal. So that it may be said that, subject to the control of a court of equity and special statutory requirements, married women, when allowed to hold an estate to their separate use, are permitted to sell, bargain, convey, grant, or otherwise dispose of it, and to incur it as they please. So she may bestow her separate estate on her husband, although at common law she could not. And especially may she convey for a valuable consideration to her husband, as we have already seen. But acts of this kind are closely scrutinized by the courts. The undue influence on the part of the husband, or the fraud of both on creditors of either, will often suffice for setting them aside.

If the wife allows her husband to receive her separate property without making a claim to it, and apply it to the wants of the family, she will generally be presumed to have assented to the arrangement. But, if the circumstances do not fully warrant this conclusion, she will be entitled to reimbursement out of his estate. It is the duty of the husband to support the wife, and she is not bound to apply her separate property even to the support of her own children.*

The fact that the husband acts as agent for the wife, or that she supports the husband, does not affect the wife's right to the separate estate.†

Under most of these statutes the wife can sue in her own name in two instances: first, where the action is in regard to her separate estate; second, where the action is against the husband.‡ And most of these acts creating the separate estate, secure to the wife in express terms the rents and profits of her lands as a part of her separate estate.

The Wife's Remedy against the Husband, who holds her Lands and the Profits thereof to himself.—There is one case, *Miner v. Miner*,§ where, it seems, the wife brought a suit in the nature of ejectment, and obtained judgment against the husband for the

* 2 Kent, page 154 (note 3).

† *Voorhies v. Bonestiel and Wife*, 16 Wall., 17; *Perry on Trusts*, § 679.

‡ See North Carolina Code Civil Pro., § 56; New York Code, and those of the other States; N. C. Marriage Act, Bat. Revisal, ch. 39.

§ *Miner v. Miner*, 4 Lansing, 421.

land. But this was not the homestead where both lived, but an out-lot of land, which the husband had in possession and refused to submit to the rights of the wife.

In a recent case in North Carolina,* a curious effort was made (taking the complaint on demurrer) to recover against the husband in an action of ejectment from the property in which both lived at the time. Judge Bynum, who delivered the opinion, expressed surprise at the novelty of the judgment asked in the complaint, and argued that it seemed an effort to obtain a divorce in an action of ejectment! The complaint charged that the husband was in the possession of her separate estate, using the rents and profits, etc., and prayed judgment for the possession. The court indicated decidedly in the opinion that the remedy of the wife in this case was an injunction to restrain the acts complained of, but held that the marital right to remain with his wife could not be disturbed; that the right of ingress and egress must be maintained; and a writ of possession, based on this judgment, should give the wife the possession, subject to the right of the husband to live with her in the same house; that this, with all necessary restraining orders, will sufficiently protect the wife in the separate estate. The court said in this opinion: "It seems generally settled now, after great confusion on the question, that a married woman is vested with the legal title to her property, and may maintain in her own name any appropriate action to preserve and maintain the same; and refers† to *Miller v. Bannister*, Kansas and Iowa Reports, and Bishop on the *Law of Married Women*.

In North Carolina it was also held that, where land was bought with the wife's money and, by mistake, the deed taken in the name of the husband, and the land afterwards levied on and sold at execution sale, at the instance of the creditors of the husband, the purchasers were held charged with the trust, either with or without notice of the wife's equity; the courts of that State holding that a purchaser at execution sale takes nothing but the

* *Manning v. Manning*, 79 N. C., 293.

† *Miller v. Bannister*, 109 Mass., 289; 10 Kansas, 56; 19 Iowa, 236; 2 Bishop, *Law Married Women*, §§ 130, 131, where the authorities on both sides are cited.

interest of the defendant in execution; and this is so where the purchase is made *without notice* of an outstanding equity.*

It has been shown that, although the married women's acts tend to convert the separate estate into a legal estate, equity continues to control, and, to some extent, supervise the same. This supervisory interference of the court of equity, together with the broad and comprehensive legislation in their behalf, should constitute full and complete protection to married women.

Other Remedies in the Courts.—It often happens that the wife's interest in land has to be asserted in the courts by showing a trust in her favor, or fraud upon her rights. These she can assert against the husband or a stranger, or both. Thus a married woman executed a mortgage on her own lands (the husband joining in) to secure a debt of the husband; an outside creditor filed a motion to subject the wife's lands in the first instance, thereby exonerating the lands of the husband, and leaving them free to outside creditors; but this was refused by the court.† The wife occupied the position of a security to the husband, and, if she had been compelled to pay the debts, she was entitled to relief against the principal, the husband, and a right of subrogation in certain instances to the place of the creditors of the husband. And as a rule, if she become security, she incurs the same liability, and is entitled to all the rights of other securities. As a general rule, the wife can only involve her land as security of the husband, or other person, by the execution of a deed of mortgage, and submitting to the privy examination and other formalities required. If she simply sign a bond or note with the husband, as his security, without special reference to the separate estate, she is not bound. In that case the court of equity would not charge her separate estate, for the reason that no reference is made in the bond or contract to the separate estate; neither is it for the benefit of the wife or her estate. This point is discussed at another place in reference to the powers and capacity of a *feme covert* to charge her estate. Then, again, she can claim the benefit of a resultant

* *Whitehead v. Whitehead*, 64 N. C., 538; *Freeman v. Hill*, 1 D. & B. Eq., 389; *Polk v. Gallant*, *ib.*, 395; *Read v. Kinnaman*, 8 Ire. Eq., 13. See to same effect, *Ellis v. Tousley*, 1 Paige Ch. R., 280.

† *Shinn v. Smith*, 69 N. C., 310.

trust, a constructive trust, or a trust by implication. If the husband or other person use the separate estate or funds of the wife in the purchase of real property, and take the deed to himself, she can have him, the holder of this legal title, declared a trustee for her benefit. If a third party purchase the estate from the holder of the legal title with knowledge of the trust, he takes it subject to the same.* Lands may often be charged with a parol trust in her favor,† as if a conveyance be made to B. by A., charged with a parol trust in her favor, the same may be enforced. But in these special cases, perhaps, she stands like all other persons. And generally, it may be stated, that the *feme covert* may avoid a fraud upon her against all who participated therein.

The Wife's Liabilities in reference to her Real Estate.—She, too, must not commit a fraud. So equity will not permit a married woman to avoid a conveyance without refunding the purchase-money.‡ Under the recent legislation (at least) in some of the States she is now held liable on her covenants in a deed.§ And if the contract to convey land is executed with the required formalities, specific performance will be decreed against her.||

Her lands are liable as security for a stranger when a deed to secure the same is executed without fraud or undue influence; and her lands may be charged for a debt in the manner allowed by law. If she propose to make a contract or deed, she is expected to comply with the requirements of the statutes. As a general rule the legislation requires that the husband must join in her conveyances, otherwise they are not binding. Perhaps nothing further than the written concurrence of the husband is necessary in the transfer of personal property.

In some of the States, says Schouler, "the wife's sole deed of her separate estate (real) is sufficient to pass her entire interest."¶ It has been decided that the wife's execution of a conveyance in

* *Lyon v. Aiken*, 78 N. C., 258; *Gidney v. Moore*, 86 N. C., 484.

† *Shelton v. Shelton*, 5 Jones Eq., 292; *Shields v. Whitaker*, 82 N. C., 510.

‡ *Knoll v. De Leyer*, 41 Barb., 208; *Schouler, Dom. Relations*, 235.

§ *Basford v. Peirson*, 7 Allen, 524.

|| *Woodward v. Seaver*, 38 N. H., 29; *Baker v. Hathaway*, 5 Allen, 103.

¶ *Schouler, Dom. Relations*, 235; *Springer v. Berry*, 47 Me., 330; *Farr v. Sherman*, 11 Mich., 33; *Beal v. Warren*, 2 Gray, 447. See, also, *Collier v. Connelly*, 15 Ind., 141.

blank is ineffectual, though the deed be subsequently supplied by the directions of the wife.* As regards the husband's joining in the conveyance with the wife, "It has been decided, on equity principles, in North Carolina,† that where a wife after marriage, supposing the whole interest in her land was in her, made a conveyance to a trustee for her sole and separate use, which her husband signed as a party, and by various clauses manifested a concurrence in her act, but did not profess directly to convey any estate, the recital in the deed that ten dollars was paid by the trustee to the wife raised a use, and in that way passed the husband's interest to the trustee."

If the wife's deed is required to be executed by privy examination and acknowledgment, one lacking these requisites cannot be enforced as an agreement to convey; it is an absolute nullity.‡

Wills by Married Women.—The wife's disability at common law, together with the policy of the same of preserving the husband's control of the property, rendered her incapable of disposing of her property by will; and the marriage of a *feme sole* was such an entire change of her condition and relations that it generally amounted to a revocation of her will executed before that event. By the English law there were some exceptions as to personal property by the consent of her husband.

This point is fully discussed with many references by Mr. Schouler under this head, to which the reader is referred,—our object being to deal mostly in questions pertaining to real property. It is true that a married woman's right to make a will was recognized in cases where the husband was dead in law, as where he had been banished for life, or an alien enemy.§

Married women were expressly excepted from the statute of wills, 34 and 35 Hen. VIII., ch. 5. The late English statute of wills, 1 Vict., ch. 26, § 8, excepts them also, providing for

* Burns v. Lynde, 6 Allen, 305.

† Barnes v. Hayborger, 8 Jones, 76; Schouler, Dom. Relations, 235.

‡ Naylor v. Field, 29 N. J. L., 287; Walker v. Reamy, 36 Penn. Stat., 410; Cole v. Van Riper, 44 Ill., 58; Cope v. Meeks, 3 Head, 387; Matherson v. Davis, 2 Cold., 443; 2 Cold., 632; Dunham v. Wright, 53 Penn. Stat., 167; 61 Ill., 426; 41 Miss., 520; 47 Ala., 456; 2 Metc. (Ky.), 255; 9 Florida, 347; 46 Ill., 344; 47 Ill., 120, 277; 48 Ill., 211; 12 Iowa, 415; 9 Iowa, 163; 13 Ohio Stat., 505; 14 Allen, 163; Southern Law Review for April and May, 1881.

§ Newsome v. Bowyer, 3 P. Wms., 37; Deerly v. Mazarine, 1 Salk, 116.

the exceptions at common law in regard to personalty. It is said, however, that so many exceptions have been allowed of late years that they almost constitute a new rule in England.

Hence it may be said that the power to make a will by a married woman is the creature of the statute in the different States. And, perhaps, in most of the States, where the wife is the sole owner by statute, she is empowered to make a will or devise. The Constitution of North Carolina* creates a separate estate in the wife to all the property which she may acquire before or after marriage, and allows her to devise and bequeath the same, with the written assent of her husband. The Constitution of Georgia creates a separate estate in the wife in the same way, but omits the power to dispose of the same by will.† The statutes of Vermont, Maine, New Hampshire, Massachusetts, Rhode Island, New York, Pennsylvania, Ohio, Indiana, Wisconsin, Louisiana, Mississippi, California, and perhaps others, confer on the wife power to dispose of her property by will.‡

It is said that in Virginia and the South Atlantic States, and also Alabama, the wife's testamentary capacity is founded upon the earlier English cases. The statutes in those States creating a separate estate may change the rule.§ Some of these statutes require the written assent of the husband.

In Ohio, a statute was passed, some years ago, giving "every male person, aged twenty-one years or upward, and every female, aged eighteen years" or upward, the power to make a will. It was held, under this statute, that a married woman could make a valid devise to pass her real estate.|| In Massachusetts, under the statute, the same power is recognized where the husband's assent is obtained, so as to bar his curtesy.¶

In New York, after several changes in the married women statutes of that State, it seems that the wife has all the powers of a *feme sole*; but, perhaps, the courts in that State, as well as elsewhere, are slow to sustain a devise to the husband. The

* Const. N. C., 1868, article 10, sec. 6.

† Const. Georgia, 1868, art. 7, sec. 2.

‡ Schouler, Dom. Relations, 256, and notes and references.

§ Burton v. Holley, 18 Ala., 408; Porcher v. Daniel, 13 Rich., 349; Michael v. Baker, 12 Md., 158. As to Vermont, see Caldwell v. Renfrow, 33 Vt., 213.

|| Allen v. Little, 5 Ohio, 65.

¶ Silsby v. Bullock, 10 Allen, 94.

intention of the statute is always regarded, however, in these cases.

The New York married women acts of 1849 give the wife power to convey and devise real and personal property, "as if she were unmarried;" and it was held "that, notwithstanding these words, a deed executed by a wife, in contemplation of death, to her husband, in good faith and voluntarily, was wholly ineffectual." Of course wills of married women, unduly obtained through the marital influence, are invalid.* Then, again, if the wife, having the statutory power to devise her real property, should execute a will, and subsequently destroys the same by the duress of her husband, it may be established on proof of his misconduct, and of its contents and execution.†

But, outside of all statutory regulations, both in England and America, a married woman may dispose of either real or personal property under a power.‡ Finally, on this subject, the practitioner and student must look to the special statutes and decisions of his own State in order to determine to what extent the disabilities of married women have been removed, and to what extent they are clothed with the capacity of a *feme sole* in the disposition of property. The mere creation of "the sole and separate estate" still leaves the wife under some disabilities, and does not convert her into a *feme sole* in respect to that property. And this is so where the wife has the legal estate by statute to her use. This general doctrine is forcibly discussed by Judge Rodman in *Pippen v. Wesson*.§ If she acts under a statute, like acting under a power, she must follow the statute.

* *White v. Wager*, 25 N. Y., 328; *Schouler's Dom. Relations*, 259. On this point see *Caldwell v. Renfraw*, 33 Vt., 213; *Noble v. Enos*, 19 Ind., 72; *Morse v. Thompson*, 4 Cush., 562; *Wakefield v. Phelps*, 37 N. H., 295; *Hood v. Archer*, *supra*; *White v. Wager*, 32 Barb., 250; 31 Barb., 371; 32 N. Y., 423 (Court of Errors).

† 1 Wms. Executors, 47.

‡ 4 Kent Com., 506; *Redf. Wills*, and cases cited; *Hughes v. Wells*, 13 E. L. & Eq., 389; *Rogers v. Hinton*, 1 Phillips N. C. Eq., 101; *Schouler, Dom. Relations*, 261, and notes.

§ *Pippen v. Wesson*, 74 N. C., 437. As to the dangerous tendency of enlarging the capacity of the wife to contract, see *Pearson, C. J.*, dissenting opinion in *Harris v. Harris*, 7 Ire. Eq., 120.

As to the Effect of the Married Women's Acts on the Doctrine of Estoppel.—Generally the doctrine of estoppel does not apply to a married woman; the party upon whom the estoppel operates must be *sui juris*, competent to make it effectual as a contract. Hence, at common law, a married woman is not estopped by her covenants of warranty. The Supreme Court of Massachusetts expressed the opinion in a *dictum* that the doctrine of estoppel *in pais* has no application to married women or infants.* In case of fraud unmixed with contract, however, whether by concealment or active conduct, it is pretty well settled, in opposition to the doctrine in Massachusetts, that a married woman may estop herself to deny the truth of her representation.†

An article on this subject, in the *Southern Law Review* (St. Louis) for April and May, 1881, gives a case from the Indiana court in 1877.‡ The following charge of the court below was in question: "If you find that the plaintiff knew that the strip of land in dispute belonged to her, and she also knew that the defendant was ignorant of her right or title to the same, and that she stood by and knew that the defendant was erecting valuable improvements upon said premises, in good faith and under the belief that the same belonged to him, and she did not disclose her claims to him, then she is estopped now to claim the land, although she was a married woman at the time." The Supreme Court of that State held these instructions to be erroneous. This opinion was based on the idea that the statute gives the wife a separate estate, but *provided* that such wife shall have no power to incumber or convey such lands except by deed, in which her husband shall join.§ The court say, therefore, "Under such a statute the courts cannot, as we think, say that a married woman

* Big. on Estop., 485, note 4 and cases cited.

† Id., 488, notes; Schwartz v. Sanders, 46 Ill., 18; Conolly v. Brantsler, 3 Bush., 702; Wright v. Arnold, 14 B. Mon., 638; Drake v. Glover, 30 Ala., 382; Wilks v. Kilpatrick, 1 Hump., 54; McCullough v. Wilson, 21 Penn. Stat., 436.

‡ Behler v. Weyburn, 59 Ind., 143. As to the decision of the Indiana court in the case of Behler v. Weyburn, see Peck v. Hensley, 21 Ind., 341; Law v. Long, 41 Ind., 586; Gatland v. Rodman, 6 Ind., 289; Scranton v. Stewart, 52 Ind., 63, which appear to take the opposite view. See, also, Wright v. Arnold, 11 B. Mon., 638; Cooley v. Steele, 2 Head., 605; Hamilton v. Zimmerman, 5 Sneed, 39, 48. See, also, Schwartz v. Sanders, 46 Ill., 18; 69 Ill., 452.

§ 1 Revised Statutes Ind., 1876, p. 550, sec 5.

may divest herself of the title to her land by an estoppel *in pais*. That would be overturning the statute, which prohibits all modes of incumbrance or conveying her land, save the one provided for." And the court cites, with approval, *Lowell v. Daniels*;* *Todd v. Pittsburg, Fort Wayne and Chicago Railroad Co.*;† *Glidden v. Strupler*;‡ *Hays v. Livingston*;§ *Gatland v. Rodman*,|| and others at variance, so far as they conflict with this decision, are overruled. Only a feoffment, fine, or lease operate by estoppel to pass an after-acquired title.¶ In deeds of bargain and sale a covenant of warranty is necessary to create such estoppel. If the deed recites that the grantor is seised of a particular estate, and the deed purports to convey that estate, he is estopped to deny he was seised of such estate.**

That the covenants of warranty in deeds executed by married women did not bind them is well settled. And consequently she was not prevented from setting up an after-acquired title.

This doctrine of estoppel has been changed in Massachusetts by the statutes relating to married women.†† *Gray, C. J.* (now one of the U. S. Judges), said: "By the common law of Massachusetts, the warranty-deed of a married woman, though executed in such form as to convey her title, did not operate against her by way of covenant or estoppel, because she was incapable of binding herself by covenant of warranty or by agreement to convey her real estate. But, by the general statute, every married woman is made capable of bargaining, selling and conveying her separate, real and personal estate, entering into any contracts in reference to the same, and suing and being sued in all matters relating thereto, in the same manner as if she were *sole*, with no other restriction than being required to obtain the assent of her husband, or the approval of a judge of this or of the Superior or Probate Court, to any conveyance of shares in a corporation,

* 2 Gray, 161.

† 19 Ohio Stat., 514.

‡ 52 Penn. Stat., 400.

§ 34 Mich., 384.

|| 6 Ind., 289.

¶ Rawle on Cov., 3d ed., 408; *Gibson v. Chouteau*, 39 Mo., 566.

** *Van Rensselaer v. Kearney*, 11 How., 297; *French's Lessee v. Spencer*, 21 How., 240; *King v. Rea*, 56 Ind., 1. This last case is said to be peculiar, and not reconcilable with the cases generally. See article in *Southern Law Review*, April and May, 1881.

†† *Knight v. Thayer*, 125 Mass., 25; Mass. statutes on this subject, ch. 108, sec. 3.

or of real property, except lease for not more than a year. Any conveyance or contract executed by a married woman in accordance with the power thus conferred, is binding upon, and may be enforced against her, to the same extent as if she were unmarried. It has been the settled law of this Commonwealth, for nearly forty years, that under a deed with covenant of warranty, from one capable of executing it, a title afterward acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also against one holding by descent or grant from him after acquiring the new title. The necessary conclusion is that, under the mortgage with full covenants of warranty, executed by Mrs. Thayer, with her husband's assent, the demandant is entitled to the demanded premises as against her husband, and also as against Mrs. Knight, to the extent of the interest since acquired by Mrs. Thayer and conveyed by her to Mrs. Knight."

In a suit for foreclosure, a married woman interposed a demurrer, which was overruled. Upon the hearing of the cause, the plaintiff's counsel produced an instrument, under seal from both the defendants, with the privy examination of the wife, asking the suit to be dismissed. This was objected to for the want of registration, but the objection was overruled.* The court said: "There are cases where a *feme covert* may sue or be sued alone, and need in no case prosecute or defend by guardian or next friend, and her husband, on leave of the court, and with her consent, defend in her name and behalf;† it would seem unavoidably to follow that she has capacity to *accept* or *refuse* his proffered aid, to employ counsel to prosecute her action, and make her defence. This power is necessary, and incident to her capacity to sue and be sued." The paper in question did not confer, or profess to confer, any authority to dispose of or affect her land, but simply to put an end to a pending suit, and the same legal competency which, where her interest requires, may prolong a litigation, is also sufficient to terminate it. So it was held, by the same court,‡ that where a *feme covert*, sued with her husband and others as surety to an official bond, accepts service of pro-

* Hollinsworth v. Harman, 83 N. C., 153.

† N. C. Code of C. P., § 56; Battle's Revisal, ch. 69, § 15.

‡ Nicholson v. Cox, 83 N. C., 48.

cess at the husband's instance, relying on him to employ counsel and defend the suit, and because of such reliance on her husband, takes no steps in the matter personally, and judgment goes by default, a case of surprise and excusable neglect is presented which entitles her to have such judgment set aside under C. C. P., § 133. Then, again, in the case of *Rencher v. Wynne*,* the suit was brought by plaintiff to recover personal property sold by defendant as sheriff, on an execution against the husband of the plaintiff, and the question was that of fraud in the sale of the property in question by the husband to the wife, the ordinary proof and the law applied as in case of fraudulent sale to defeat creditors, but it was contended that, as the plaintiff was a *feme covert*, she is not to be affected by the same rules of law as other persons in transactions of this kind. On this point the court say: "It is suggested that the plaintiff, being the wife of the assignor, is *not free from the supposed marital influence*, and ought not to be affected by the same rules which would govern in deciding upon transactions between independent persons. But if the wife has legal capacity to contract with her husband, make loans to him, and take security for repayment, she must act in subordination to the general law, as well as others. A fraudulent conveyance to her, with her assent, can no more be supported and allowed to defeat creditors, than if made to a stranger. She can no more participate in a fraudulent conveyance and seek benefit under it than can an indifferent person. So she may lose her own property by actual fraud, uncoerced. She cannot acquire property from her husband through the instrumentality of his fraud, known to herself, to the injury of his creditors."†

The wife must plead her disability, and make defence in apt time like other persons; if not, she is bound by the judgment. Under the practice in North Carolina, prior to 1868, the separate estate could only be reached by bill in equity. It was a proceeding *in rem*, and not *in personam*.‡ But now execution may issue against a married woman in that State, collectible out of her separate estate.§

These latter instances, not being intimately connected with the

* *Rencher v. Wynne*, 86 N. C., 268.

† *Johnstone v. Cochrane*, 84 N. C., 446; *Vick v. Pope*, 81 N. C., 22.

‡ *Smith v. Gooche*, 86 N. C.

§ C. C. Procedure of 1868, § 259.

point under review, are given to illustrate the tendency of legislation and judicial opinion in the qualification and enlargement of the capacities of married women, and at the same time holding them to responsibilities and obligations unknown to the common law, and to modify the strict rule of estoppel as to married women.

The Husband's Right to Curtesy by these Married Women's Acts.—Tenancy by curtesy is a freehold estate in the husband for his natural life. He acquires it by the fact that a child capable of inheritance is born of the marriage. This privilege of the husband extends to all lands and tenements of which the wife was seised at any time during coverture, whether legal or trust estate, whether in fee simple or by way of remainder or reversion.*

Four things are essential at common law to entitle the husband to curtesy: † *First*, A lawful marriage; *Second*, Seisin of the wife at some time during coverture; *Third*, Birth alive of issue capable of inheritance; *Fourth*, Death of the wife. After the birth of the child, the husband's title to curtesy becomes possible, and the curtesy is then *initiate*. After the death of the wife, the title to curtesy becomes complete, and the curtesy is then *consummate*.‡

The prevalence of marriage settlements in England, of late years, excluding the curtesy, has made the common law almost a nullity.§ It existed in this country in all the older States; but in many of them legislation had provided that it was not subject to execution sale during the life of the wife. Some of these States have expressly abolished or modified this interest.

* 1 Washburn, Real Property, 128, and authorities cited; 2 Black., 126; notes by Chitty; Williams, Real Property, 8th ed., 218; Coke Litt., 30 a; Ibid., 29 a, n.; Schouler, Domestic Relations, 163, 164, 165.

† The common-law view of curtesy is briefly given in the text, in order to better appreciate the legislation and the decisions under the Married Women's Acts.

‡ In the recent work of Sharswood & Budd, entitled *Leading Cases in American Law of Real Property*, the cases of *Jackson v. Jackson*, 5 Cow. (N. Y.), 74, and *Wells v. Thompson*, 13 Ala., 293, are taken as Leading Cases on "Curtesy of the Husband." See pp. 218, 247, of said work. See notes to "Married Women's Acts," on p. 286. These cases contain valuable learning on this subject.

§ 1 Washburn, Real Property, 129; Williams, Real Property, 187; Schouler, Dom. Relations, 164.

Perhaps, Iowa and Indiana have given a certain defined interest by way of inheritance, instead of curtesy in the wife's lands. Curtesy, says Schouler, is not recognized in Texas, California, Louisiana, and other States, where the tenure of real estate comes from the civil law rather than the common law. In some of the New England States, as Massachusetts and Rhode Island, tenancy by the curtesy is expressly reserved by statute.* In New York, under the Acts of 1848 and 1849, the decisions of the courts of that State have not been uniform and satisfactory, and it is difficult to tell what the law on that subject is, at this time, in that State.†

It would seem that the husband is entitled to curtesy in an equitable fee settled to his wife's separate use.‡

The various statutes and constitutional provisions of the different States, creating the separate estate have the effect to convert this interest into a legal estate, but the intention of the legislation is to be obtained in the construction of the same. And, the rules in equity, which govern the equitable estate settled on the *feme covert*, are constantly resorted to in the interpretation of these statutes. The equitable fee being in the wife, according to the English doctrine, the husband was entitled to curtesy. The equitable estate in a court of equity is considered the land, and the trustee a mere instrument of conveyance, and this estate is governed by the same rules as other real property; in this instance, equity follows the law. But the same English courts held that where the estate was limited to the separate use of the wife, free from the control of her husband, he is not entitled to curtesy.§

* See statutes of different States, cited in 1 Washburn, Real Property, 258, and note; and note to 4 Kent Com., 34; Ross v. Adams, 4 Dutch, 160; Noble v. Noble, 19 Ind., 431.

† Hurd v. Cass, 9 Barb., 366; Clark v. Clark, 24 Barb., 581; *contra*, Billings v. Baker, 28 Barb., 343; see the decisions in this State and others, compared in *Southern Law Review* for April and May, 1881, pp. 71 to 81.

‡ Appleton v. Rowley, Law Rep., 8 Eq., 139; but see Moore v. Webster, Law Rep., 3 Eq., 267; Schouler, Dom. Relations, 196; Williams, Real Property, 219, note 1.

§ Hearle v. Greenback, 1 Ves., 298; Cochran v. O'Hern, 4 W. & S., 98; Rigler v. Cloud, 2 Harris, 363; Williams, Real Property, 219, note 1; Moore v. Webster, Law Rep., 3 Eq., 267; 3 Atk., 716.

But, perhaps, these decisions were not uniform by the English courts. It is reasonable to conclude from both the English and American decisions that, where the words of the trust, or of the statute, are simply "*for the sole and separate use* of the wife, the husband is not deprived of his curtesy."*

Nor will the mere power of disposal added to the same, if not exercised, deprive the husband of curtesy. But, if such power of appointment be exercised, his right is gone.† The words "free from the control of the husband," being superadded, have given rise to contradictory opinions, but, perhaps, the weight of authority is in favor of the construction that these words apply only to control during coverture, and the curtesy of the husband is not bound. The Constitution of North Carolina, 1868,‡ provides that "the real and personal property of any female in this State, acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised or bequeathed, and, with the written assent of her husband, conveyed by her, as if she were unmarried." The construction of this provision of the Constitution, in regard to its effect on the husband's right to the curtesy estate, has not yet been invoked by any case in that State. But, from the reasoning and light thrown on the question by the adjudications, these words of the North Carolina Constitution do not deprive the husband of his curtesy, except she exercise the power to convey or devise in her lifetime. Of course, the assent in writing required to her conveyance, is a release of his curtesy. In 1848, the legislature of North Carolina passed a law, which forbids the husband from leasing for his own life, or any shorter term, the land of his wife, except by her consent, in the shape of acknowledgment and privy examination.

The act also exempted the common-law interest of the hus-

* 2 Bishop, Law of Married Women, secs. 141-147, and notes.

† See notes on this point, and argument in the article from *Southern Law Review* for April and May, 1881.

‡ Const. N. C., 1868, art. 10, sec. 6. But the N. C. Act of 1871-2 gives the husband the curtesy out of both the legal and equitable estate of the wife. See Bat. Rev., ch. 69, sec. 30.

band from execution during the life of the wife. In *Houston v. Brown** it was suggested that this act took away the husband's curtesy, but the court said: "In the absence of an express provision to that effect, we should be slow in adopting the conclusion that it was the intention of the law-makers to enact such a radical change in the law" (viz., to deprive the husband of his tenancy by the curtesy). So we have no doubt that the court will hesitate to construe this constitutional provision as taking away the tenancy by the curtesy in that State. But some of the decisions give a plausible reason for the destruction of the tenancy by the curtesy by some of these acts, in the argument that where an act prevents the husband from acquiring any interest in his wife's estate *during* her life, it destroys the estate of tenancy by the curtesy *initiate*. Then if there is no curtesy *initiate* there could be none *consummate*.†

It should be observed, however, in reference to New York, the later decisions hold that the married woman's acts of 1848-9 of that State do not destroy the tenancy by the curtesy.‡ But to conclude on this point, it may be said that the changes produced in the law by the various married women's statutes carry one over so wide a territory, where the paths diverge and intersect each other in so many instances, that it is a matter of extreme difficulty to give a satisfactory view of the law. In the light of subsequent adjudications we may trace a uniform principle in the various States. This doctrine of the tenancy by the curtesy will be more readily settled than many other questions which are raised by those statutes, such, for instance, as the application of the doctrine of the equitable charge on these legal estates, the effect of the wife's contracts upon the separate estate, etc.

As this question is new, and is likely to arise very frequently, under these statutes, we employ a portion of an article taken from the April and May number, 1881, of the *Southern Law Review* :

* *Houston v. Brown*, 7 Jones, 161; N. C. Revised Code, chap. 56, sec. 1.

† *Thurber v. Townsend*, 22 N. Y., 517.

‡ *Hatfield v. Sneden*, 54 N. Y., 280; *Lansing v. Gulich*, 26 How. (N. Y.) Pra., 250. Other States have settled the doctrine the same way, 2 Bishop, *Married Women*, sec. 148 and notes; *Cole v. Van Riper*, 44 Ill., 58; *Freeman v. Hartman*, 45 Ill., 57; *Houck v. Ritter*, 76 Penn. Stat., 280; *Ege v. Medlar*, 82 Penn. Stat., 86; *Staples v. Brown*, 13 Allen, 64; *Lynd v. McGregor*, 13 Allen, 182.

As to the husband's right to curtesy.

This difference, among others, existed between curtesy and dower: that the husband might have a right of curtesy in trust estates, whilst legal seisin was necessary to support dower.

The reasons for this distinction will not here be touched upon, but only some of the rules governing the courts in the construction of settlements to the wife's separate use, mentioned by way of proper illustration of those obtaining in construing the meaning of these statutes.

The general doctrine is thus stated: * "Real estate may be limited to the separate use of the wife so as not to exclude entirely the husband's marital right; and unless his marital right be wholly excluded, he is not necessarily excluded from being tenant by the curtesy."

This is admitted to be the true test, but its application has been a matter of great difficulty, and the decisions of the courts have not been uniform.

For example, in the case of *Moore v. Webster*, *supra*, it was held that the wording of the will—"to hold," etc., "independently of any husband or husbands she or they may have, and free from his and their control and liabilities, and to be assigned and disposed of as she or they may think fit, by any deed or will in writing"—operated as a total exclusion of the whole marital interests of the husband, and his claim of curtesy was denied.

So, in *Hearle v. Greenbank*,† a previous case decided by Lord Chancellor Hardwicke, it had been held that a conveyance to trustees for the sole and separate use of a married woman, free from the control of her husband, and with power of disposing of the same by deed or will, excluded all *legal and equitable seisin of the husband*, and that he could have no curtesy.

But the judgment in *Moore v. Webster* is criticised in a subsequent case,‡ the court saying:

"Then there is the recent case of *Moore v. Webster*, where the real estate was limited to the separate use of the wife, and to be assigned and disposed of as she might think fit by deed or will, and Vice-Chancellor Stewart held that the husband was not entitled to curtesy, on the ground that he was totally excluded from the whole marital interest. I am unable to concur in that decision, for there the whole equitable fee was given to the wife."

Upon the whole, it would appear that where the words of the trust are simply "for the sole and separate use" of the wife, the husband is not deprived of his curtesy.§ Nor will a mere power of disposal added to the same, if not exercised, deprive him.|| But if such power of appointment be exercised his right is gone.¶

* *Moore v. Webster*, L. R., 3 Eq., 267.

† 3 Atk., 716.

‡ *Appleton v. Rowley*, L. R., 8 Eq., 139.

§ 2 Bishop's Mar. Wom., secs. 141-147, and notes.

|| *Ibid.*; *Morgan v. Morgan*, 5 Madd., 408; *Payne v. Payne*, 11 B. Mon., 138; *Hart v. Soward*, 14 B. Mon., 301; *Kimball v. Kimball*, 1 How. (Miss.), 532; *Mitchell v. Moore*, 16 Gratt., 275; *Lowry v. Steele*, 4 Ohio, 170; *Alexander v. Warrance*, 17 Mo., 228; *Talbot v. Calvert*, 24 Penn. Stat., 327; *Boyd v. Small*, 3 Jones's Eq., 39; *Baker v. Heiskell*, 1 Cold., 641; *Ege v. Medlar*, 82 Penn. Stat., 86; *Cushing v. Blake*, 29 N. J. Eq., 399.

¶ *Clark v. Clark*, 24 Barb., 581; *Steward v. Ross*, 50 Miss., 776; *Pool v. Blakie*, 53 Ill., 495.

The words, "free from the control of the husband," superadded to the above, have, as already appears, given rise to some difference of opinion, it being contended that the husband was thus, by necessary implication, deprived of any interest in the property.*

It is believed, however, that in this country, as in England, the better construction is that such words apply only to control during coverture, and do not bar curtesy. In *Rigler v. Cloud*† the words were: "not be subject, in anywise, to the future control," etc. Held, husband's curtesy was gone. This case, however, is criticised in *Cushing v. Blake*, *supra*.

In *Waters v. Tazewell*,‡ where the right of curtesy was also denied, the property was conveyed "so that neither the trust estate and property, nor the rents, issues, income, or proceeds thereof, should at any time be subject to the power, disposal, or control of the present or any future husband," etc.

In *Mason v. Dease*§ the same conclusion was arrived at, the settlements providing that the wife's property and its proceeds should never be subject to the control or contracts of the husband.

There has been some question, also, whether the fact of a deed being made by the husband himself was not evidence of intention that no right of curtesy should exist.|| But, whatever the decisions of courts in particular instances, the general rule is undeniable that, unless the terms of the instrument creating the trust, expressly or by necessary implication, deprive the husband of his right to curtesy, it still remains to him.

Though the separate estate created by the married women's statutes is a legal estate, and the true question is, what was the intent of the legislature, still reference to the authorities will show a constant citation of the rule in equity as an aid in determining that intent.

These statutes differ much among themselves, and, though reference to all is impossible, a few must be examined somewhat carefully as types of classes, so as to arrive with any certainty at the views held by the different courts.

The Maryland statute of 1841 provides that "no real estate hereafter acquired by marriage shall be liable to execution, during the life of the wife, for debts due from her husband;" further, that "any married woman may become seised or possessed of any property," etc., "by direct devise, bequest, demise, gift, purchase, or distribution, in her own name and as of her own property, provided the same does not come from her husband after coverture."

Under such a statute the only effect is to suspend execution during the life of the wife for debts due by the husband. The husband is tenant by the curtesy initiate upon birth of a child; his rights are scarcely affected at all; only the remedy of his creditors, by postponement of execution, "leaving the judgment lien perfected on the life-estate of the husband to be enforced on the death

* *Stokes v. McKibbin*, 13 Penn. Stat., 267, and notes *ante*.

† 14 Penn. Stat., 361.

‡ 9 Md., 291.

§ 30 Ga., 308. See, also, *Jones v. Brown*, 1 Madd. Ch., 191; *Boker v. Booker*, 32 Ala., 473; *Frazer v. Hightower*, 12 Heisk., 94; *Adams v. Dickson*, 23 Ga., 406; *Hooker v. Lee*, 7 Ire. Eq., 83; *Ward v. Thompson*, 10 Md., 251; *Williams v. Claiborne*, 7 Smed. & M., 488; *Loftus v. Penn*, 1 Swan, 445.

|| *Sayers v. Wall*, 26 Gratt., 354. But see *Frazer v. Hightower*, and *Cushing v. Blake*, *supra*; *Taylor v. Smith*, 54 Miss., 50.

of the wife."* Under such a statute it would appear that a conveyance by husband and wife would be subject to the lien of any judgment against the husband enforceable, in case he survived, upon his estate by the curtesy, if the lien still continued in force. And such, it is supposed, would be held to be the law in Missouri.†

Under a statute not very different, it has been held in North Carolina:‡ "In the absence of an express provision to that effect we should be slow in adopting the conclusion that it was the intention of the law-makers to enact so radical a change in the law (viz., to deprive the husband of his tenancy by the curtesy); because, if such was the intention, it is reasonable to presume it would have been declared in express terms, and not be left as a matter of inference. We are not able, however, to see anything in the section referred to calculated to raise even a doubt as to its proper construction."

The Act of March 25, 1852, of New Jersey, seems to have been modelled after those of New York, 1848 and 1849. The first section declares that the real and personal estate of any female who may thereafter marry, and the rents, issues, and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her *sole and separate* property, as if *she were a single female*.

There were also provisions as to females then married, which need not be considered here. It is sufficient to say that in all instances where the estate of the husband has already vested, the acts are never construed to divest it. Such an interpretation would be unconstitutional.

As to parties married thereafter, the statute completely destroys all estate of the husband during coverture. The wife holds her property as a separate property, free from her husband's debts and control. She may, with his assent, dispose of the same, and her grantees hold her free from any claim on the part of her husband's creditors, of any character whatever. In *Porch v. Fries*,§ the court thus briefly and clearly announces the law:

"By the Married Women's Act of March 25, 1852, in cases coming within the provisions of that act, the husband has, during her life, no interest or estate in the lands of his wife. She holds them to her separate use as if she were a *feme sole*, free from his control. She can sell them with his assent, and if she so sells and conveys them, she conveys them as she holds them,—free from any interest or estate of her husband. At common law, the death of the wife was necessary to the estate by curtesy. It is one of the four requisites laid down in the authorities on the subject. But, upon the birth of a child, another anomalous estate was created, called tenancy by the curtesy initiate. It was the increasing the estate for their joint lives, which he held before in his wife's lands, into an estate for his own life. The Married Women's Act, as it prevented his acquiring any interest in his wife's estate during her life, destroyed the estate of tenancy by the curtesy initiate.||

* *Logan v. McGill and Wife*, 8 Md., 461. See *Baynton v. Finnall*, 4 Smed. & M., 193.

† The law in Maryland has been changed since. See Code, art. 45, sect. 2, and *post*, *Mason v. Johnson*.

‡ *Houston v. Brown*, 7 Jones, 161.

§ 18 N. J. Eq., 204.

|| *Thurber v. Townsend*, 22 N. Y., 517; *Billings v. Baker*, 28 Barb., 343;

"The better opinion and the weight of authority is that this act, although inconsistent with the estate by curtesy initiate, does not defeat the husband's curtesy at the death of the wife, provided she has not aliened her estate before. The act only protects her estate during her life; it does not at her death affect the law of succession as to real or personal estate.*

"The only authority to the contrary that I find is in the reasoning and two opinions of Potter, J., in the case of *Billings v. Baker*.† This point was not that on which the decision turned. The question was on a motion, in a partition suit, to strike out the name of the husband of one of the tenants in common. It turned on the question whether the husband had, in the life of his wife, any interest in the lands such as to make him a proper party to a bill in partition. Three of the four judges concurred, Potter being one, that he had no such interest, which opinion is doubtless correct. But the case does not show whether they concurred in his views as to the husband's title to curtesy at the death of his wife—a question not there raised."‡

The statutes of New York, of 1848 and 1849, contained a provision that a married woman might convey and devise her real and personal property in the same manner and with like effect as if she were unmarried, being in other respects much like that of New Jersey, already mentioned—the essential difference being that in the latter-named State the assent of the husband was necessary to enable her to convey. At the time these acts were passed, a previous one had in express terms provided that the estate of a husband as tenant by the curtesy should not be affected by its provisions. Upon the construction of the later acts, it was necessary to decide whether, by necessary implication, they repealed the former act.

The case of *Billings v. Baker*§ has been already referred to in the citation from *Porch v. Fries*. In the report are two opinions by Potter, J.,—one at the Special Term, the other at the General Term. Both were of the same tenor, and held that the statutes had destroyed tenancy by the curtesy. The origin of curtesy and the reasons upon which it was founded, are elaborately considered, as well as the current of decision in equity courts, with especial reference to Lord Hardwicke's opinion in *Hearle v. Greenbank*.

Tenancies by the curtesy, initiate and consummate, were said to be but continuations of the freehold interest of the husband *jure uxoris*. "This primary freehold interest of the husband was assignable by him, and was subject to be taken on execution for his debts. This was an estate enduring for the joint life of himself and wife. Upon birth of a child, the estate of tenancy by the curtesy

Hurd v. Cass, 9 Barb., 366; *Sleight v. Reed*, 18 Barb., 169; *Ross v. Adams*, 4 Dutch., 160.

* *Ross v. Adams*, 4 Dutch., 160; *Naylor v. Field*, 5 Dutch., 292; *Van Note v. Downey*, 4 Dutch., 219; *Hurd v. Cass*, 9 Barb., 366; *Clark v. Clark*, 24 Barb., 581; *Vallance v. Bausch*, 28 Barb., 642; *Morgan v. Morgan*, 5 Madd., 248.

† 28 Barb., 343.

‡ See also *Johnson v. Cummins*, 16 N. J. Eq., 97; *Prall v. Smith*, 31 N. J. Eq., 244.

§ 28 Barb., 343.

became *vested*, and formed the estate *initiate*; and, thirdly, by the wife's death, it became *consummate*."

And the question is asked: Could the wife convey the property, if the husband had an interest therein? "She may convey *any interest therein*," says the statute. "Could she do this, if her husband had *curtesy* therein? Could she convey his *vested estate*? To entitle her to convey with the same effect as an unmarried female, must she not *hold* the same interest therein, as if she was an unmarried female? Can she convey the *whole estate* with the same effect, if she does not *hold* the whole of it? If she *holds* the whole estate, where is his *curtesy*?"

"I hold it to be nothing less than an absurdity to say that a statute that has destroyed the power of this estate to vest, has not also destroyed the estate. To sustain the position that this estate is not abrogated, it is absolutely necessary to establish either, first, that all the old law-writers were mistaken in fixing the time of the vesting of the estate to be the birth of issue; or, second, that the Acts of 1843 and 1849 have so far modified the common law as to change the time of its *vesting*; or, thirdly, what is still more absurd, that the wife, at her will and pleasure, can alienate and destroy a *vested estate* that exists in the husband."

A further argument was that, to entitle the husband to *curtesy*, he must have had either a legal or equitable seisin during the coverture, according to the statements of Lord Hardwicke in *Hearle v. Greenbank*. The intent of the legislature was also considered, and stated to be to place married women, so far as their lands were concerned, on the *same basis precisely as unmarried females*.

In a subsequent case to the above,* when tried at Special Term, the decision in *Billings v. Baker* was followed, and it was held that *curtesy* was abolished in all the real property of the wife affected by the acts named. of 1848 and 1849. But at General Term the judgment was reversed.† The reasoning is much the same as in the New Jersey case already cited. It answers, however, in detail, the points made in the same case at Special Session, and also in *Billings v. Baker*. The language of Lord Hardwicke is criticised in this, that, inasmuch as the husband had no seisin either in law or equity during the coverture, he was not entitled to *curtesy*, and the requisites stated, as marriage, seisin by the wife of an estate of inheritance (which might be either legal or equitable), birth of issue, and death of wife.

The length of the opinion will not allow its being set out in full, nor does the writer think it necessary, although it is very interesting and able. It is insisted that there can be no tenancy by the *curtesy* until the death of the wife. It continues: "Justice Lamont seems to be of the opinion that the title by *curtesy initiate* is the same as when *consummate*; that there is really no difference; and the conclusion to which he comes is founded mainly upon this theory. I think this position is unsound. He cites some authorities to show that where the title is *initiate*, the husband may dispose of the estate, and that it may be taken by his creditors, and held during his life. Admitting that the husband may make a valid grant of the estate *initiate*, and that the grantee may hold during the life of the husband, it does not follow, I think, that initiation of the estate is equal to a consummated estate. It may well be that the grantee would take an estate

* In the Matter of Winne, 1 Lans., 508.

† Id., 2 Lans., 21.

during the life of the husband, there being no limitation in the grant. . . . The statutes give to the married woman the sole and exclusive use of her property; she may do with it as she pleases. She may grant or devise her real estate. Her husband, as husband, has no rights in her property during the time she is his wife, a 'married female.' And, if it is absolutely necessary that the estate known as tenancy by the curtesy must have a commencement—be vested—during the life of the wife, and that the legislature could not abolish those elements or qualities of this estate, which, by the common law, must have existed before the death of the wife, without destroying the estate *in toto*, then I concede that the husband cannot be tenant by the curtesy after the death of his wife. I think it will not be denied that the legislature possessed the power to deprive the husband of all right *jure uxoris* and as tenant by curtesy initiate, and still preserve the right of the husband to the tenancy by curtesy consummate."

And as to the intent of the acts, it is construed to be rather to interpose between the wife and the husband's creditors, and to give her control of her property during her life, than to prefer the heir to the husband.

The judgment in this case is undoubtedly in accordance with the weight of authority; and in *Hatfield v. Sneden* the law is said to be substantially settled, that while the Acts of 1848 and 1849 excluded the husband during life from control of or interference with his wife's separate real and personal estate, and gave her alone the power of disposition by deed or will, yet they left him the right of curtesy in her real property, and of administration for his own benefit of her personality, in so much as remained at her death undisposed of and unbequeathed or undevised.* This seems to be also settled doctrine elsewhere.†

Thus, though the conveyance of the property of a married woman during her coverture might be free from any claim by the creditors of her husband, whether he survived her or not, yet there is left to him the remains of a curtesy estate, a *curtesy consummate*, which had never been a *curtesy initiate*, but vested only on the death of the wife. Certainly, however, this abridged estate by the curtesy is but little like what it was before. It is a new estate, possessing few of the incidents of the old, inferior in some respects to dower.

In Michigan, as in many other States, the statute preserves to the husband a life estate by express enactment. This estate is said to bear no resemblance to curtesy at common law, which is said to be entirely abrogated.‡ And in Maryland, under the recent code, where also a life-estate, in case the wife die intestate, is reserved to the husband in her real property, but power is given her to devise the same, the effect of the statute is said to be to defeat curtesy as

* *Hatfield v. Sneden*, 54 N. Y., 280; see *Hurd v. Cass*, 9 Barb., 366; *Shumway v. Cooper*, 16 Barb., 556; *Clark v. Clark*, 24 Barb., 581; *Vallance v. Bausch*, 28 Barb., 633; *Lansing v. Gulick*, 26 How. Pr., 250; *Jaycox v. Collins*, 26 How. Pr., 497; *Burke v. Valentine*, 52 Barb., 412; *Ransom v. Nichols*, 22 N. Y., 110.

† 2 *Bishop's Mar. Wom.*, sec. 148, and notes. And see also *Cole v. Van Riper*, 44 Ill., 58; *Freeman v. Hartman*, 45 Ill., 57; *Beach v. Miller*, 51 Ill., 206; *Houck v. Ritter*, 76 Penn. Stat., 280; *Ege v. Medlar*, 82 Penn. Stat., 86; *Comer v. Chamberlain*, 6 Allen, 166; *Silsby v. Bullock*, 10 Allen, 94; *Staples v. Brown*, 13 Allen, 64; *Lynde v. McGregor*, 13 Allen, 182.

‡ *Tong v. Marvin*, 15 Mich., 60.

it existed at the common law, and the life-estate preserved to the husband by statute to be quite a different thing. And so it was held that he had no life-estate in a defeasible fee, however it might be at the common law.*

But these decisions, as it is believed, are not inconsistent with the views already set forth, that in the absence of any express enactment the husband would be held entitled to a life-estate in the undisposed of portion of his wife's statutory separate estate, although she could hold, convey, or devise the same as though she were a *feme sole*, though the reasoning in the opinions expressed may not be entirely consistent with such views. In the Maryland case, the concluding portion of the opinion is as follows: "That no estate by the curtesy can exist with respect to any lands so held by a married woman, no matter how absolute and unqualified her estate, is clear; for the power is expressly given to her to devise the same as fully as if she were a *feme sole*, thereby defeating the curtesy of the husband and depriving him of any interest therein; for his interest can exist only in case his wife dies intestate, and in that event the code provides that he shall have a life-interest in her lands. Now this is not in any sense an estate by the curtesy as known at the common law, but a statutory life-estate, which devolves upon him only under the provisions of the code. Construing these provisions, it seems to be quite clear that the life-estate of the husband is given only in cases where the wife has such an estate as she may dispose of by will. It is given only in case she shall die intestate, and, as said by Chief Justice Buchanan, in *Newton v. Griffith*, 'a man cannot die intestate of that which is not devisable.' So, the real property of the wife in which the husband takes a life-estate, must be understood to mean such real property as is devisable by the wife, and does not exist where, as in this case, the wife had not an estate which she could have disposed of by will."

The Improvements Placed on the Wife's Lands by the Husband.—Controversies often arise between the husband and the heir of the wife in regard to improvements made in the wife's lifetime by him on her real property.

The general rule is said to be strict, that the husband cannot recover compensation for improvements made on the wife's lands. Under the English rule, where the husband erects buildings, or makes other permanent improvements, the presumption is that he intended it for his wife's benefit, and he cannot recover for it.† This same doctrine is held, perhaps, in all the American courts, though, doubtless, occasioning in some instances great hardships,‡ and, as the husband has no interest in these improvements, of

* Code, art. 45, sec. 2; *Mason v. Johnson*, 47 Md., 347.

† *Roper, Husband and Wife*, 54; *Campion v. Colton*, 17 Ves., 264; 1 *Washburn, Real Property*, 281; *Schouler, Dom. Relations*, 165-167.

‡ *Burleigh v. Coffin*, 2 Yost, 118; *White v. Hilreath*, 82 Vt., 265; *Washburn v. Sproot*, 16 Mass., 449; *Webster v. Hilreath*, 33 Vt., 457.

course his creditors have none. An agreement between husband and wife might vary the rigid rule. If this were not so, the husband would be allowed to make the heirs a debtor against their will. The wife might simply own a dower interest, and it would not be supposable that, in the absence of some very peculiar reason, the husband could charge the reversioner with improvements of the property.

Tenants by the Curtesy—Tenancy in Dower—Estovers—Emblements.—While speaking of husband and wife, it is thought not too foreign to the subject to speak of them when death has severed the relation: the husband, on the death of the wife, a tenant by the curtesy, and, on the death of the husband, the wife becomes tenant in dower. These are *life-estates*, and have certain rights, and are under certain obligations to the reversioner.

1. Every tenant for life is entitled, of common right, to take reasonable *estovers*, that is, wood from off the land for fuel, fencing, and agricultural erections, and other necessary improvements.* Some of the courts in this country have held that the timber cut on the land must be used on the land, and cannot be sold, or exchanged even to purchase material for repairs.†

The case of *Dalton v. Dalton* was a case where the land had been divided among the heirs, and the dower covered part of the land going to two of the reversioners. The dower included the dwelling-house and a valuable mill. The widow, in order to repair the mill, got all the timber off the land belonging to one of the reversioners, and the land of the other reversioner was equally convenient.

The heir, on whose land the timber was cut, filed a bill against the widow and the other reversioner, alleging that the widow and the other heir (both made defendants) were acting in co-operation, and with the design to make his (complainant's) portion of the land bear all the burden of the repairs needed by the life-tenant.

Judge Pearson says this: "Upon the other question arising out of the right as tenant in dower, there is more difficulty. She certainly has a right to get timber and wood for the purposes

* Coke Litt., 416; 4 Kent Com., 11th ed., 73, and notes.

† *Miles v. Miles*, 32 N. H., 147; *White v. Cutler*, 7 Pick., 248; *Ibid.*, 152. But see, also, *Dalton v. Dalton*, 7 Ire. Eq., 197; *Jones v. Jones*, Busbee, Law, 177; *Childs v. Smith*, 1 Md. Ch. Dec., 483.

above stated, and, except under peculiar circumstances, from what part of the land she will get it is a matter left to her discretion, unless the act amounts to waste, because of the excess in the quantity of the timber (or in case of the destruction of shade trees or fruit trees). How far this court will interfere to control her in the exercise of a legal right (no waste being alleged) is a grave question." "This question will seldom arise where the reversion belongs to one person, or where the lands have not been divided among the heirs." He further says: "We are inclined to the opinion, that, in *an extreme case*, where the widow acts out of mere caprice and partiality, with a view to favor one at the expense of the other, this court might be induced to interfere." The life-tenant is not allowed to do any permanent injury to the inheritance. If he does, he subjects himself to an action of waste, or a bill to restrain further commission of acts of this kind.

2. The life-tenant is entitled through his lawful representative to *emblems*. By this term is meant the crops growing upon the land. By crops is here meant the products of the earth, which grow yearly, and are raised by actual expense and labor; but not fruits which grow on trees, which are not to be planted yearly, or grass, and the like, though they are annual.*

Says Judge Kent: "The profits, or emblems, are given on very obvious principles of justice and policy, as the time of the determination of the estate is uncertain. He who rightfully sows, ought to reap the profits of his labor, and the emblems are confined to the products of the earth arising from the annual labor of the tenant. The rule extends to every case where the estate for life determines by the act of God, or by the act of law, and not to cases where the estate is determined by the voluntary, wilful, or wrongful act of the tenant himself." "The tenant, under the protection of this rule, is invited to agricultural industry, without the apprehension of loss, by reason of the unforeseen contingency of his death."†

If the tenant marries, she is not entitled to the growing crop.‡

3. Tenants for life have the power of making underleases for

* 1 Bouvier, Law Dic., 465.

† 4 Kent Com., 73.

‡ Hawkins v. Skeggs, 10 Hump. (Tenn.), 31. If she dies before the seed is sown in the ground, the cost of preparing the ground cannot be recovered: Price v. Pickett, 21 Ala., 741.

any lesser term, and the same rights and privileges are incidental to those under-tenants which belong to the original tenants for life.

Liabilities of Tenants for Life or for Years.—"The law has discovered a similar solicitude for those who have an interest in the land, as a remainderman or a reversioner. Therefore if a tenant for life or for years, either by neglect or wantonness, cause a permanent waste to the substance of the estate, whether the waste be voluntary or permissive, as by pulling down houses, suffering to go to decay from the want of ordinary care, cutting the timber unnecessarily, opening mines, or changing one species of land for another, he becomes liable in a suit by the person entitled to the immediate estate of inheritance, to answer him in damages, as well as to have his future operations stayed."*

The ancient remedies for waste by writ of *estrepement*, and writ of waste at common law, have become nearly if not quite obsolete in both England and America. Now the remedy is by an action in the nature of an injunction bill, where the injury would be irreparable, or a special action to recover damages. In an action in the nature of an injunction bill, the court may direct an account to prevent a multiplicity of lawsuits.†

The American doctrine of waste is not exactly the same as the English. "The remedies are more enlarged, and better accommodated to the circumstances of a new and growing country."‡

In Virginia it has been held that "the tenant in dower, in working coal mines already opened, may penetrate into new seams, and sink new shafts, without being chargeable with waste."§ In North Carolina it has been held not to be waste to clear tillable land for the necessary support of the tenant's family, though the timber be destroyed in clearing, and that a tenant in dower might use timber for making staves and shingles, when that was the ordinary use, and the only use to be made of such lands.||

In Tennessee the law is construed in favor of the widow ; she

* 4 Kent's Com., 76, and notes.

† 4 Kent's Com., 77 ; *Crockett v. Crockett*, 2 Ohio St., 180 ; *Rogers v. Rogers*, 11 Barb. (N. Y.), 595 ; *Dupree v. Dupree*, 4 Jones (N. C.), 387.

‡ 4 Kent's Com., 78.

§ *Findley v. Smith*, 6 Murf., 134 ; *Crouch v. Prevyer*, 1 Rand., 258.

|| *Parkins v. Coxe*, 2 Hayw., 339 ; 2 Hayw., 110.

may cut down timber for necessary use, provided the estate be not injured, and enough be left for permanent use.*

In Pennsylvania the tenant may use mines already open, and sell the products, and cut timber for use in mining.†

On this important question of the liabilities of the tenants in dower and tenants by the curtesy, and the various questions pertaining to these and other tenants, and also the laws of the several States the student is advised to consult 4 *Kent's Commentaries*, Lecture 55. As to the power and practice in a court of equity on this subject, the careful perusal of *Story's Equity Jurisprudence* is recommended, §§ 909-919.

As has been shown in speaking of the change made in the doctrine of estoppel in its application to *feme covert*s by the "Married Women's Acts," to what extent legislation has gone in some of the States in regard to married women, it has been truly said: "The tendency of legislation and of judicial decisions in recent times has been to invest the wife with the capacity to own property as if she were *sole*. This necessarily carries with it the capacity to contract with reference to such property, and to that extent she is relieved from the disabilities of coverture at common law. Now, husband and wife are no longer one person in the sense that they cannot contract with each other. It may be stated generally that they may make contracts with each other, which will be upheld in equity, and, under the recent 'Married Women's Acts,' at law. Further, it may be said as a general rule, that the validity of such contracts will stand upon the same footing as contracts made between persons who are strangers to each other. Thus, the fact that a man is indebted, will not prevent him from conveying his property, real and personal, for a good and sufficient consideration, to a third person; neither will this fact prevent him from making such conveyance to his wife."‡

* *Owen v. Hyde*, 6 Yerg., 334.

† *Niel v. Niel*, 19 Penn. St., 323. In this State the court will restrain unskillful mining, but not such as merely tends to exhaust the mine: *Irwin v. Covode*, 24 Penn. St., 162.

Massachusetts adopts the strict English rule: *Conner v. Shepherd*, 15 Mass., 164. As to the doctrine in New York, and remedies under code, see 26 Barb., 409.

‡ *Lady Arundell v. Phipps*, 10 Vesey, 139; *Steadman v. Wilbor*, 7 R. I., 481;

The husband may now prefer his wife as a creditor, just as he may prefer any other creditor.*

It has been said in this chapter that the husband may become the agent of the wife; but this does not apply to her real property not of her separate estate. As she can make no contract in reference to property not her separate estate, she can have no agent. What she cannot do herself, she cannot do by another.† But as the right to the possession and disposition of said property during the coverture is in the husband, when he acts in reference to it, he acts in his own right, and not for her, although he is said, in technical language, to be seised of the land in right of his wife. It follows that no act of his, done with reference to such property, will work an estoppel against her.‡ The acts of the husband sometimes work an estoppel in reference to personal property not of her separate estate. Thus, where a husband was present at the sale of a chattel, in which his wife had an interest as distributee of the estate, and induced one to buy by declaring the title under which the property was sold to be good, it was held that he estopped both himself and his wife, she surviving him, from afterwards disputing the title of the purchaser.§

Bank v. Hamilton, 34 N. J. Eq., 158; *Summers v. Hoover*, 42 Ind., 153; 41 Ind., 456; *Tomlinson v. Mathews*, 98 Ill., 178; 95 Ill., 35.

See *Tyberandt v. Rancke*, 96 Ill., 71, where the conveyance was made by an indebted wife to her husband. In North Carolina, under the Constitution of 1868, and the recent laws of that State, the wife can sue and recover from the administrator of the husband, "money advanced and lent" during the coverture: *George v. High*, 85 N. C., 99. As to contracts in equity *before* the recent statutes in that State, see *Dula v. Young*, 70 N. C., 450.

* *Tomlinson v. Mathews*, 98 Ill., 178. † *Wilcox v. Todd*, 64 Mo., 390.

‡ *Hall v. Callahan*, 66 Mo., 316, 324.

§ *McCaa v. Woolf*, 42 Ala., 389. Where the wife permitted land and slaves to be sold for the benefit of her husband, in consideration for which the husband agreed to settle property to the wife's separate use, this was held a sufficient consideration to sustain a deed by husband to wife, made several years thereafter: *Perkins v. Perkins* (Tenn.) case. See *Southern Law Review* for July, 1874, citing *Powell v. Powell*, 9 Hump., 484; *Reedy v. Bragg*, 1 Head., 513; Vice-Chancellor in *Wicks v. Clark*, 3 Edw., 58.

CHAPTER XVIII.

DOWER ESTATE, AND THE MODE OF ENFORCING THAT
RIGHT—STATUTORY CHANGES, ETC.

DOWER is a life-estate, created by act of the law. "It exists where a man is seised of an estate of inheritance and dies in the lifetime of his wife. In that case she is, at common law, entitled to be endowed for her natural life of the one-third part of all the lands whereof her husband was seised, either in deed or in law, at any time during the coverture, and of which any issue that she might have had, might by possibility have been heir."* We are informed by the writers that formerly there were five kinds of dower; and in some places the whole land was assigned her, in others one-half, and in others again one-fourth. But dower by the common law, as above defined, is the only one of these several kinds of dower that prevails in the United States. Some of the other kinds have long since been abolished in England.

It is not the object of this treatise to discuss the different kinds of dower, the origin and history of the dower-estate, nor the vast conflict of judicial opinions upon the manifold questions which have arisen on this important subject. Mr. Scribner, in his work on dower, has devoted a large space in his first volume to these questions, to which the student and practitioner are invited.

We shall recognize the fact that this tenancy in dower exists in

* 4 Kent Com., 35; Litt., sec. Dower, 36; Parks's treatise on the Law of Dower, 5; see Scribner on Dower, 18-19; as to the different kinds of dower, 1 Cruise, 167.

See *Thompson v. Morrow*, 5 Sergeant & Rawle (Penn.), 289. This case is selected by Messrs. Sharswood & Budd, in the recent work, "Leading Cases in American Law of Real Property," as the leading American case on "Dower." The two principal points in the case are:

1. The wife is not barred of dower except *privily* examined.
2. The widow takes no improvements as against a purchaser from the husband, but, throwing such out, shall be entitled to dower at the value at the time of the assignment.

See the cases and notes of the authors, extending over about 100 pages. See p. 291.

all of the United States, and proceed to epitomize a few of the leading questions about which controversy continually arises in this country. It will be observed that, at common law, the wife is dowable of all the lands of which her husband was seised *during the coverture*. This cut off all alienations by the husband during the coverture. Or, in other words, if the husband did convey the land during coverture, the vendee of the husband took the estate subject to this incumbrance, and the wife, on the death of the husband, could sue the alienee of the husband for dower. But, in the United States, by statutory regulations in many of the States, the common-law right of dower has been changed.

The most important change, perhaps, is the allowance of the dower only in the lands of which her husband *died seised*. Under this law, the husband could alien his entire estate and die without leaving any estate to the wife. This was the earlier law of North Carolina.* But in 1868-9 the legislature restored the *common-law* right of dower.† Other States have changed the law of dower. In some of the States the wife is entitled to one-third in *fee*; in California, instead of dower, the wife has one-half interest in the common property.

New York, in 1860, provided dower out of lands of which the husband *died seised*, where he leaves no minor child or children, and gave the income of all the lands to the widow during the minority of the youngest child.

In speaking of the origin of dower, Mr. Scribner says:‡ “It is a provision intended for the sustenance of the wife and younger children at a time when the husband and father can no longer minister to their wants. The dependent condition of the widow, and the helplessness of the orphan, have ever been proverbial, and many centuries ago it was written of them that they should be constantly held in remembrance by the Great Father of all. A feeling of tenderness and pity for their forlorn and destitute condition is a common sentiment of mankind, and the instincts

* Revised Code, title “Dower.”

† Battle's Revisal, ch. 117, secs. 1, 2, 3, 4, 5. See Scribner on Dower, vol. i., for the changes in the law of dower by the different States; also, 4 Kent Com., 36 (note 1).

‡ Scribner on Dower, vol. i., 20.

of humanity have declared that a fund sacred to that purpose alone should be set apart for their maintenance and support." "The relation of husband and wife," says Sir Joseph Jekyll, "as it is the nearest, so it is the earliest, and therefore the wife is the proper object of the kindness and care of the husband."

In the earlier ages, the husband could not make a will, and before trusts were invented the husband could do nothing for the wife during his own life, and, but for the dower allowed, the widow in many instances would have been left without provision for her sustenance.

It is said that the Church, through its active and vigilant influence, did much to establish and maintain the institution of dower. Says a law writer: "The provision for the widow was attributable to the exertions of the Church, which never relaxed its solicitude for the interest of wives surviving their husbands, winning, perhaps, one of the most arduous of its triumphs when, after exacting for two or three centuries an express promise from the husband at marriage to endow his wife, it at length succeeded in engrafting the principle of dower on the customary law of all Western Europe." And Lord Bacon said: "The tenant in dower is so much favored as that it is the common byword in the law that the law favoreth three things, (1) Life, (2) Liberty, (3) Dower."*

The claim of dower attaching upon all the lands of which the husband was seised during the coverture is a very serious incumbrance upon the use and circulation of real property; but, in point of fact, this claim for dower is almost universally extinguished by the wife joining in the conveyance upon sales and mortgages of land. And this fact, together with the legislation changing the common-law right of dower, makes most of our controversies grow out of the land owned by the husband at the *date of his death*.†

We have but few instances of the wife suing the regular and ordinary vendee of the husband, even in those States where the common-law rule prevails. As before stated, several of the States

* Bacon's Reading on the Statute of Uses, ed. 1642, pp. 31, 32.

† 4 Kent, 41; Parks v. Brooks, 16 Ala., 529; Thrasher v. Pinkford, 23 Ala., 616.

have reduced dower down to the lands whereof the husband *died seised*.*

In *Combes v. Young*,† the Supreme Court of Tennessee gives the claim of dower preference over the claims of the creditors of the husband. Chief Justice Catron, then on the bench of that court, severely condemns the Act of 1784 for destroying the common-law right of dower, and leaving the wife's support at the mercy of the court.

Marriage is Essential to Dower.—In order to entitle the woman to dower she must answer the description of a lawful wife. This is a proposition so obvious that the statement of the same almost looks like stating a proposition recognized by all and controverted by none. But it is well for the student to take hold of the essential and admitted proposition involved in a subject, in order to progress easily and orderly to those more complicated and open to daily dispute. It will readily appear that the simple proposition might be disputed by the heir when sued for dower, by replying that the applicant for dower was not the lawful wife of the deceased ancestor. This issue has involved a vast amount of controversy in England, but it is not our intention to enlarge on the legality of marriages, but, for most purposes of this work, we shall go upon the idea that the marriage is valid. To undertake a discussion of the marriage necessary to authorize dower would swell the limits of the present work beyond our design.

The subject of the legality of marriages in England and America is thoroughly discussed by Mr. Scribner‡ in his first volume.

It may be remarked, however, that marriage is considered in the light of a civil contract. Mr. Scribner quotes Judge Reeves, in his work on the *Domestic Relations*, as saying: "There is nothing in the nature of a marriage contract that is more sacred than that of other contracts, that requires the interposition of a person in holy orders, or that should be solemnized in a church. An idea of this kind has arisen wholly from the usurpation of the Church of Rome on the rights of the civilian. She claimed

* This was done in Connecticut, Tennessee, Georgia, and North Carolina: note c, 4 Kent Com., 41.

† *Combes v. Young*, 4 Yerger (Tenn.), 218.

‡ Scribner on Dower, vol. i., 58 to 142. See Bishop Mar. and Div., §§ 66, 67.

the absolute control of marriages on the ground that marriage was a sacrament, and belonged wholly to the management of the clergy. The solemnization of a marriage by a clergyman was a thing never heard of among primitive Christians until Pope Innocent III. ordered it otherwise.

"The only ceremony in practice among them was for the man to go to the house where the woman dwelt, and, in the presence of witnesses, lead her away to his own house. It is a mere civil transaction, to be solemnized in such manner as the legislature shall direct, whether by a clergyman or any other person."*

Mr. Scribner says, notwithstanding this concurrence of opinion of Reeves, Kent, Greenleaf and Bishop, an examination of the adjudged cases in the United States will show much the same contrariety of decision as has existed in Great Britain.†

In prosecutions for bigamy, and actions for criminal conversation, proof of actual marriage is necessary; but, on questions in regard to dower and other controversies, a marriage might be shown by circumstances, such as long cohabitation together with the parties holding themselves as man and wife, and being recognized as such.‡

What Property subject to Dower.—*Land*, as a species of property, as a general rule, is subject to dower; but at common law, especially, it was not every *interest* in land that this estate will attach; for instance, an estate for life is an interest in land, but not the subject of dower.

The word *dower* has a known technical signification, and is ordinarily applicable only to real property. It is true that, by statute, in Virginia, Kentucky, Arkansas, and Missouri, and perhaps other States, during the existence of the institution of slavery, dower was conferred on the wife in slave property. In regard to property subject to dower, two kinds may be mentioned about which the English courts have been much divided. First, *Mines and quarries*. Second, *Wild lands*. It was contended in England that the wife was not dowable of mines, because it would be waste

* Reeves, Dom. Relations, 196. See, to same point, Chancellor Kent, 2 Greenl. Ev., 2d ed., § 460; Bishop, Mar. and Divorce, § 162.

† Scribner on Dower, vol. i., p. 71.

‡ Jackson v. Claw, 18 Johns., 346. As to decisions in the different States, consult Scribner on Dower, vol. i., pp. 71 to 99.

in the life-tenant to work mines, and that it could not be divided without injury to the heir; but it was held and understood that dower may exist in mines or quarries if they had been opened during the lifetime of the husband; and that, if they could not be divided by metes and bounds, they may be divided by the profits.* The reason assigned why mines not opened by the husband in his lifetime were not the subject of dower was, that the interest of a tenant in dower is a life-estate only; but an interest which can enable the possessor to open mines must be an estate of inheritance, for it is an act of waste in a tenant for life to open new mines, and can be restrained by the suit of the heir.

It sometimes happened that the husband had a grant of strata in fee in the lands of another; that is to say, the husband owned the *mineral* and *mining* interest in the lands of this third party. Now, in this interest, the only mode of enjoying the property is in working it. In this case it would seem that dower would attach. If a man grants the mines on his own lands to another, it would be strange to say that he must grant an estate of inheritance in order to confer a right of taking the benefit on the grantee.† This right to dower in the mines belonging to the husband, whether on the lands which he held in fee or those upon the lands of third persons, was established in the leading and well-contested case of *Stoughton v. Leigh*.‡ The qualification to the principle in this case was, of course, according to the English rule, that the mines must have been opened by the husband in his lifetime, but had no dependence upon the subsequent continuance or discontinuance of working them, either by the husband in his lifetime, or those claiming under him since his death.

There are, perhaps, but few adjudged cases on this point in the American courts, but the same rule has been adopted in New York, Pennsylvania, Maine, and Virginia.§ And, we suppose,

* Scribner on Dower, 191.

† Scribner, vol. i., 191; Park, Dow., 117-20.

‡ *Stoughton v. Leigh*, 1 Taunt., 402; 2 Roper, Husb. and Wife, 342. The doctrine of *Stoughton v. Leigh* has been recognized by the text-writers and the courts in England: 1 Hilliard on Real Property, 2 Ed., 140, § 9; 4 Kent, 41; Washburn on Real Property, 5, § 12; *The King v. Dunsford*, 2 Adol. & El., 568, 593; 1 Cruise, tit. 6, ch. 2, § 1, p. 32.

§ *Coates v. Cheever*, 1 Cow., 460; *Billings v. Taylor*, 10 Pick., 460; *Moore v. Rollins*, 45 Maine, 493; *Findley v. Smith*, 6 Murf., 134; 25 Monthly Law Rep., 121.

substantially the same rule would apply to most of the other States.

As to Wild Lands.—The question as to whether the widow is entitled to dower in unimproved lands held separately from the improved estates, has been a mooted question in some of the courts. In Massachusetts, in the case of *Conner v. Shepherd*,* it was held that lands in a state of nature were not subject to dower.

In deciding this case, Chief Justice Parker said: "Upon this question we have had considerable difficulty. By the common law, the widow is dowable of all the real estate of which her husband was seised during the coverture, with the exception of a castle, erected for public defence, of common in gross, and some other kinds of estate not known to this country. The question, whether forests, parks, and other property of a similar nature, are also exceptions, seems never to have occurred, probably because there is no instance in Great Britain of such property held separately and distinct from improved and cultivated estates. In this country, on the contrary, there are many large tracts of uncultivated territory, owned by individuals," etc. He then says: "If dower could be assigned in estates of this nature, the views of those who purchase such property would be obstructed, and an impediment to their transfer would be created, and, in many instances, the inheritance would be prejudiced." "For," adds this judge, "according to the principles of the common law, her estate would be forfeited, if she were to cut down any of the trees valuable as timber." And Chief Justice Parker made the further argument: "It is well understood by the common law, and the principle has been repeatedly settled in this court, that the dower of the widow is not to be assigned so as to give her one-third of the land in quantity, but so that she may enjoy one-third of the rents and profits, or income of the estate. Now, of a lot of wild land, not connected with a cultivated farm, there are no rents and profits."†

* *Conner v. Shepherd*, 15 Mass., 164. Subsequent to this decision, the legislature of Massachusetts passed a law, providing that the widow should not be dowable of "wild lands," except that wild land or wood lot was used in connection with the farm: General Statutes of Mass., 1860, ch. 90, § 12.

† Same views held in *Webb v. Townsend*, 1 Pick., 21; *White v. Willis*, 7 Pick., 193; *White v. Cutler*, 17 Pick., 248; *Shattuck v. Gregg*, 23 Pick., 88.

A different doctrine as to "wild lands" or unimproved lands, exists in other States, and the widow is allowed dower in all the lands of the husband, whether they have been improved or are in a state of nature. The early Virginia Colony Act of 1664 placed woodland and cleared land upon the same footing as to dower. In *Findley v. Smith*, Cabell, Judge, said: "The law of waste, in its application here, varies and accommodates itself to the situation of our new and unsettled country."*

It was also said by Roane, Judge, in the same case: "That cannot be waste, for example, in an entire woodland country, which would be so in a cleared one. A contrary doctrine would starve a widow, who could not subsist without cultivating her dower land, nor cultivate it without felling timber. A clearing of the land, in such circumstances, would not be a lasting damage to the inheritance, nor a disinherison of him in remainder, which is the true definition of waste. It would, on the contrary, be beneficial."

The same doctrine is held in Michigan, Kentucky, Illinois, Georgia, and, perhaps, other States.† In Pennsylvania, North Carolina and Tennessee, the common-law nicety, in regard to the forfeiture of the life-tenant for waste, is greatly modified, and it is not, therefore, objectionable to the assignment of dower out of waste lands, especially if this use of the widow is the only beneficial use for which the land is adapted. Or, if the widow cuts timber only for necessary use, and enough be left for permanent use, and the estate not materially injured. For instance, the widow may cut timber on one part of the land to fence another part.‡

The same doctrine held in Maine and New Hampshire: *Durham v. Angier*, 20 Maine, 242; N. H. Laws, 190, § 1; Rev. Stat. Me., 1857, ch. 103, § 2.

* *Scribner on Dower*, vol. i., p. 200, sec. 21; *Findley v. Smith*, 6 Munf., 184. As to same doctrine, see *Macauley v. Dismal Swamp Land Company*, 2 Rob., 507.

† *Campbell*, Appellant, 2 Doug. (Mich.), 141; *Hickman v. Irvine*, 3 Dana (Ky.), 121; *Schnebly v. Schnebly*, 26 Ill., 116; *Chapman v. Schroeder*, 10 Ga., 321. As to New York, see *Walker v. Schuyler*, 10 Wend., 480; *Jackson v. Brownson*, 7 Johns. See, also, as to Pennsylvania, *Hastings v. Cruckleton*, 3 Yeates, 261.

‡ *Hastings v. Cruckleton*, 3 Yeates, 261; *Ballentine v. Poyner*, 2 Hayw. (N. C.), 110; *Perkins v. Cox*, *Ibid.*, 339; *Wilson v. Smith*, 5 Yerg., 379; *Combs v. Young*, 4 Yerg., 218; *Owen v. Hyde*, 6 Yerg., 334.

In Rhode Island, dower is assigned in woodland by express statute.* It seems that the State of Indiana has abolished both curtesy and dower, and substituted, in behalf of husband and wife, an interest in one or another's real estate remaining at decease, and making land on the same footing as personal property in this regard.†

The English law of dower has been greatly changed, so that by the English Dower Act, 3 and 4 Will. IV., ch. 105, it is provided that no widow shall be entitled to dower "out of any lands which shall have been absolutely disposed of by her husband, in his lifetime, or by will." This English Dower Act went into effect in 1834. This is precisely what has been done in several of the American States, that is to say, the wife is dowable only of such lands as the husband shall *die seised*, which is a radical change of the common-law right of dower; for, prior to the year 1834, in England, the husband could not convey any lands during the coverture, except by the concurrence of the wife, and this could be done only by fine, in which the wife was separately examined.‡

The English Dower Act of 1834 made another important change in the law of dower (corresponding to the legislation at that time existing in this country), to wit, that the wife is dowable of an equitable *estate*. It is a striking instance of the change of law to suit the age, condition, and circumstances of a people, that so many of the United States should have so early changed the common-law doctrine of dower; and that the English, from which we draw our early ideas of the nice technicalities, and, as we might say, the sacred institution of dower, should adopt the same legislation as our own. And yet more strange, some of the States, especially North Carolina, did, in 1867 and 1868, "*restore the common-law right of dower*," thus placing the estate of dower to its original and primitive qualification; that is, by extending the wife's right to dower in all the lands of which the husband is *seised during the coverture*.§ Perhaps the great poverty as a re-

* Public Laws (R. I.), 1844, 188, sec. 2.

† 1 Ind. Stat. (1862), 291; Schouler, Dom. Relations, 186; Washburn, Real Property, 219, notes; 4 Kent Com., 36, notes.

‡ See this fully discussed in Williams, Real Property, 224, and notes.

§ See North Carolina, Acts 1866-7, also 1868-9.

sult of the civil war in this country, and the immense loss of personal property, induced the vast amount of legislation in behalf of married women. Thus dower rights were enlarged and liberalized, the curtesy of the husband was frequently destroyed, and the wife's capacity enlarged almost to that of a *feme sole*.

It was at this period, too, that homestead and personal property exemptions were created to a very large extent. The legislators of the times, in their zeal for the welfare of a people despoiled by war, forgot all constitutional limitations, and attempted, by the aid of some of the courts, to make these rights, thus conferred, superior to the rights of creditors existing prior to the same. But the cool and deliberate judgment of the courts was not long in fixing the constitutional limits as long recognized, and too permanent and sacred to be departed from, even by the exigencies of war.*

But to return to the idea in England: even before the Dower Act of 1834, through the medium of trusts and other nice technicalities, the conveyancers for generations have been enabled to defeat this estate. And, says Mr. Schouler: "While the law of dower has been gradually fading out of sight in England, it attains its fullest development in this country. Curiously enough, almost all the modern cases on the subject are American."†

What Estate of the Husband will Confer the Right of Dower.—Dower is not allowed in estates of remainder or reversion expectant upon an estate of freehold, but the husband must have a right to the immediate freehold. But it is not necessary that the wife should have issue by the husband; the possibility of issue is sufficient. She must, according to the common law, be of such an age at the death of her husband as to have had a *possibility* of conceiving, or bearing children, and this age the law contemplates

* See *Hill v. Kessler*, 63 N. C., 437 (in 1869). In this case the Supreme Court sustained the constitutionality of the *homestead* in its application to pre-existing debts. But the Supreme Court of the United States, in the case of *Edwards v. Kearzey* (at Oct. Term, 1877), overruled *Hill v. Kessler*.

The case of *Greene v. Summey*, 80 N. C., 187, makes all laws void which were passed to carry out these unconstitutional exemptions.

† 1 Wash. Real Property, 257, 258; *Hoffman v. Savage*, 15 Mass., 130; *Symmes v. Drew*, 21 Pick., 278; *Chiles v. Smith*, 1 Md. Ch., 483; *Crockett v. Crockett*, 2 Ohio Stat., 180; *Park*, Dower, 355.

to be nine years.* It is not essential to the right of dower that the wife should be physically capable of bearing children, as dower is a right incident to marriage.

What Seisin in the Husband Necessary.—At common law the husband must have been *seised*, either in *deed* or in *law*, at some period during the coverture.

Under the feudal system, what was called *livery of seisin* was a ceremony absolutely necessary to a perfect and complete transfer of the estate. This was simply an open and notorious delivery of the possession to the tenant in the presence of the peers of the Lords' Court; and this was usually effected by the lord of the manor, or some one acting by authority in his name, going upon the land with the tenant, and making a symbolic delivery of the possession to him, by placing in his hand some portion of the premises, such as a turf or twig, the *pares curiæ* acting as witnesses.

No deed was necessary, but the title passed by virtue of the transmutation of the possession.

This being done the tenant was *seised in deed* as tenant of the freehold. This rule requiring livery of seisin was abolished in England in 1845, of the 8th and 14th Victoria. The mere signing and sealing of a deed of feoffment of lands, unless the possession were formally delivered by the feoffor to the feoffee, was in no instance sufficient to transfer an estate of freehold.

There were two kinds of livery of seisin: 1st. *Livery in deed*. 2d. *Livery in law*.

If the feoffor and feoffee went within sight of the premises, and the former said to the latter, "I give you yonder house or land; go and enter the same, and take possession of it accordingly." If the feoffee entered during the lifetime of the feoffor, the seisin was complete. Or if he could not enter without endangering his life, it was sufficient to venture as near as might be consistent with safety, and there make claim to the land. This was sometimes called a *constructive* seisin. This was *livery in law*. *Livery in deed*, as above indicated, is where the feoffor goes upon the premises with the feoffee, and there taking the ring of the door

* Scribner on Dower, vol. i., page 217, and authorities cited.

of the principal mansion, or a turf or a twig, and delivers the same to the feoffee in the name of seisin.

Livery of seisin being made in either of the modes, the feoffee became invested with the legal title of the freehold, and was said to be seised thereof *in deed*.*

There were also two kinds of *seisin*: first, *seisin in deed*; second, *seisin in law*. It has already been shown that when livery of seisin had taken place, either by livery *in deed* or livery *in law*, the feoffee was seised *in deed*.

But *seisin in law* is where the title is cast upon the person by operation of law, as, for instance, land acquired by descent. Immediately on the death of the ancestor the heir is said to be seised *in law*. But, according to the rules of the common law, the heir must make an actual entry upon the land, either in person or by some authorized agent, before he was invested with seisin *in deed*.†

If, then, the husband was seised, either *in deed* or *in law*, at some period during the coverture, the widow was entitled to dower. But a mere right of entry was insufficient to confer that estate.‡

These elementary principles are glanced at in order to a more scientific arrangement of the law of dower; but, in the United States, these common-law modes of conveyance have never been adopted to any considerable extent. And then, again, the common distinction between seisin in deed and seisin in law is in a great measure obliterated in the United States, and in this country the heir is considered actually seised without entry.§

Mode of Conveyance in the American States.—The conveyance of land must generally be according to the requirements and formalities of each State, the statutes thereof being the guide. And as a general rule when the deed is made, acknowledged, delivered, and recorded, in the manner prescribed by statute, it vests the purchaser with the title, and he is seised *in deed*, without any

* 4 Greenl. Cruise, 67; Coke Litt., 48, a, b.

† 3 Litt., sec. 448.

‡ Coke Litt., 31, a; 2 Black. Com., 131; 4 Kent, 37.

§ Burrell's Law Dict., title "Seisin;" Scribner on Dower, 242 (notes); 1 Hilliard Real Prop., 82, § 18; Brow v. Wood, 17 Mass., 68; Green v. Chelsea, 24 Pick., 71, 78; Davis v. Mason, 1 Peters, 506; 8 Johns., 208; 2 Ohio Stat., Rep., 308.

actual or symbolical entry on the lands. The mere recording of the deed is considered equivalent to livery of seisin at common law. In some of the States, the mere delivery of the deed, *without registration*, operates to pass a perfect title as between the parties and all persons who have notice of the conveyance.* Some of these statutes make an *unrecorded deed* good as against judgment-creditors, whether with or without notice.†

In some of the States the failure to have the deed registered makes it invalid, and a failure to comply with this statutory requirement is like the omission of livery of seisin at common law. Under a statute of this kind the husband would not have such a seisin under an unrecorded deed as would entitle the wife to dower. Massachusetts had an old statute of 1652 which declared that no conveyance of land was valid until *recorded*, but this has long since been repealed.

The Widow of the Bargainee entitled to Dower under an Unregistered Deed.—In North Carolina it was held, in the case of *Thomas v. Thomas*,‡ that the registration of a deed for lands was necessary to give the legal seisin, in order to entitle the widow to dower. But the court held this only so at *law*. That was a suit for dower in a court of *law*, and the petitioner was bound to show legal seisin in the husband. But they said in equity the widow was dowable, and this on the authority of *Tolor v. Tolor*,§ and *Morris v. Ford*.|| In *Tolor v. Tolor* the court held that a voluntary conveyance, fairly obtained, and afterwards destroyed by the donor before registration, a court of equity will compel the donor to convey the same property to the donee, and this, too, against the party who had obtained a conveyance *mala fide* from the donor. The court said: "The bargainee (in a deed unrecorded) has not a mere equity but an incomplete legal title," which, when registered, takes effect, and it is perfected in the owner from the time of its execution. "If he dies before registration, his wife is entitled to dower." This means, in the light of the decision

* Scribner on Dower, 240.

† Scribner, 241; 1 Wash. Real Prop., 36, § 84; Smith, Land. & Ten., Am. ed.; see note 1, Scribner, vol. i., page 241.

‡ *Thomas v. Thomas*, 10 Iredell, 123. § *Tolor v. Tolor*, 1 Dev. Eq., 456.

|| *Morris v. Ford*, 2 Dev. Eq., 418; see also, *Tate v. Tate*, 1 Dev. & B. Eq., 22.

in *Thomas v. Thomas*, the widow's right to dower can be asserted in a court of equity. It was held also, in *Norwood v. Morrow*,* that a deed of trust, executed by the husband but not registered until after his death, defeats dower of the widow of the mortgagor.

This question was much discussed in England, under the statute of enrolment. And, in case of the death of the bargainee before enrolment, there was a diversity of opinion as to whether the wife took dower.

Chief Baron Gilbert held the wife not dowable when the husband died before enrolment.† The same ruling was made on several occasions. But Preston takes the opposite view, and says: "If it be once admitted that *after* enrolment the fee is in the bargainee by relation, all the consequences of a seisin in fee from the date of the deed must follow." Therefore, the wife is dowable.‡ So that it seems that the weight of opinion is, that if the deed is enrolled after the death of the husband, the wife is dowable. But this doubt of the English case is settled in favor of the widow by Act of 3 and 4 Will. IV., sec. 1, passed in 1834.

Mr. Scribner, in speaking of the case of *Thomas v. Thomas*,§ thinks the court of North Carolina held the doctrine of relation very much to the prejudice of the widow. But on examination of the case it will appear simply that the widow could not recover in a court of *law* for the want of the *seisin* required at common law, but held that in a court of equity she could recover dower. So that it was only a question as to the forum in which the widow sued for dower.||

The statute in that State makes mortgages not registered void as to *creditors* and *purchasers*, but the widow was neither a creditor nor purchaser. If a husband make a *voidable* deed, and do not avoid it during life, the wife is not dowable; but, if the deed

* *Norwood v. Morrow*, 4 Dev. & B., 442.

† See Gilb. Uses, 96.

‡ *Vaughan v. Atkins*, 5 Burr, 2765; see cases cited by Scribner, vol. i., pp. 248-50.

§ *Thomas v. Thomas*, 10 Iredell, 123.

|| The Constitution of 1868 having blended the courts of law and equity in North Carolina, that question is now obsolete. See Constitution of N. C., 1868.

be *void*, the title remains in the husband, and the widow takes dower.*

Exoneration of the Widow's Dower to Pay off Incumbrances.—In case of a devise of land, charged with the payment of a sum of money, and the devisee dies before the charge is paid, the widow of the devisee, before she can be called upon to contribute, is entitled (in aid of dower) to have the whole of the personal property of the deceased, and, after that, all of his real estate not included in her dower interest, applied to discharge the incumbrance. The lands vested in the husband (the devisee) *cum onere*, immediately upon the death of the testator. It follows that the widow takes dower, as her husband took the fee simple, *cum onere*, but the widow is entitled to exoneration.†

Mr. Scribner says: "In the United States the general rule is, that an unregistered deed is good, not only against the grantor, his heirs, and devisees, but also as against all persons having notice of the rights of the grantee; and, therefore, against all such persons the wife is entitled to her dower. With regard to a portion of the States, however, as already noticed, this general proposition is subject to some degree of qualification."‡

The Widow is Dowable of an Equitable Estate.—Prior to 1834 in England, when the Dower Act of 3 and 4 William IV., was passed, the widow was not entitled to dower where the husband only held an *equitable estate*, although the husband was entitled to his curtesy.§ At an early day in England the system of *uses* had gained a strong foothold. This system was borrowed from the civil law, which recognized the distinction between a right to the enjoyment of the rents and profits of land and a right of property in the land itself. This system of uses (by which there existed two *estates* in the same property, *legal* and *equitable*), had its origin in the ingenious efforts of religious corporations to evade the statutes of mortmain. By these statutes of mortmain the English Parliament sought to *limit* these religious corporations in the acquisition of landed property. These statutes in their terms only applied to *legal* estates, *equitable* estates at that time being

* *Norwood v. Morrow*, 4 Dev. & B., 442; Scribner on Dow., vol. i., p. 558.

† *Thompson v. Thompson*, 1 Jones (N. C.), 483; *Caroon v. Cooper*, 63 N. C., 386; *Doe v. Woods*, Bus., 290; *Ruffin v. Cox*, 71 N. C., 256.

‡ Scribner, Dow., vol. i., 251.

§ See Scribner, ch. 19.

comparatively unknown. Then, to evade these statutes, if a conveyance of land was intended for the Church, it was conveyed to individuals with the contract and understanding that the Church should be entitled to the beneficial enjoyment of the land, the *legal* title of which was in an individual.

At this period the courts of chancery were under the control of the ecclesiastics. And these courts said, here is a party who has the *legal* title to land, but when he took the title he took it charged with an interest in favor of *another*. It was, therefore, held that the grantee of the *legal* estate had his *conscience* affected. This was a legitimate subject of equitable cognizance. And it was held that a *trust estate* was not subject to dower.

Under this system great objections existed to the construction which the courts placed upon the *nature* and *incidents* of this *equitable* estate. One complaint was that widows were deprived of their dower. So that, by the statute of uses, enacted in 27 of Henry VIII. (in 1535), this *double* property in land was destroyed—not by *destroying* the use or equitable interest—by the changing of the same into a *legal* estate. So that the party who had the *equitable* estate had also the *legal* estate. It resulted, therefore, that dower being a *legal* claim, very soon attached to the estates theretofore called *equitable* estates.

While the statute of uses had the effect to give dower in the estate of the beneficiary, yet, for other reasons, the courts of equity, in the administration of what was deemed strict justice, soon found a mode of practically nullifying this statute. This was by the introduction of the system of *trust estates*; the trust, however, being but little different from what was called the *use* before the statute.* It is a little curious, however, that, when the equity courts thus established the system of trusts, that they respected the will of the legislature, so as to annex to the trust estate the incident of *curtesy*; yet they did not give the widow dower of the trust estate. It is true some of the judges labored zealously to have the estate of dower attach the same as curtesy. So upon this point there was great conflict in the judicial holdings. But Blackstone says, that “trust estates were not subjected to dower, more from a cautious adherence to some hasty precedents

* Gilb. Uses, 96; Park, Dower, 34; 1 Greenl. Cruise, 171, § 21; Williams, Real Prop., 134-36; Walker's American Law, 300.

than from any well-founded principle.”* But to settle the rule, and in behalf of dower rights, by the Dower Act of 3 and 4 William IV., ch. 105, the widow is entitled to dower in the *trust* estate. This act of Parliament only applied to marriages contracted since January 1st, 1834. As to those marriages subsequent to that date, the distinction as to dower between *legal* and *equitable* estates is completely abolished.†

In the United States Trust Estates chargeable with Dower.—In some of the States the English statute of uses is substantially adopted, and of course dower attaches, even upon the strict common-law theory of *seisin*, for this statute makes the interest a legal interest.‡

In other of the States the rule of the common law has either been abrogated or modified so as to make any complete equitable interest of the husband subject to the wife's dower. This seems to be the law in Virginia, Kentucky, New Jersey, Pennsylvania, Alabama, Mississippi, New York, Maryland, North Carolina, Ohio, Indiana, Illinois, Iowa, Rhode Island, Tennessee, Missouri, Kansas, and, under the present statute, in the District of Columbia.§

Even before the statute in Virginia, the English doctrine was strongly resisted.|| But that State, in 1785, provided for dower in equitable estates. Mr. Scribner says this is the first statute of the kind in the United States, and that it was subsequently adopted in Kentucky, Mississippi, and Alabama, without any change in the phraseology.¶ The English doctrine was never adopted in Pennsylvania.**

* 2 Black. Com., 337.

† 3 and 4 William IV., ch. 105.

‡ On this point, see 2 Wash. Real Prop., 142-56, and Scribner on Dower, with notes, vol. i., 382-90.

§ Stat. Va., 1785 and 1792; Blair v. Thompson, 11 Gratt., 441; 1 Rev. Stat. Ky., 572; Gully v. Ray, 18 B. Mon., 107; N. J. Laws, 397; Rev. Stat., 1847, p. 71; Dubs v. Dubs, 31 Penn. Stat., 149; Laws of Ala., 247, § 9; Clay's Digest, 157; Parks v. Brooks, 16 Ala., 529; Revised Code Miss. (1857), 468, art. 167; Revised Code Dist. Col. (1857), 199, § 2; 3 N. Y. Rev. Stat., 5th ed., 200, §§ 84, 85; 1 Md. Code (1860), p. 325, art. 45, § 5; Battle's Revised N. C. Laws, p. 839 (chap. 117, sec. 2), also N. C. Code, 1854, chap. 118, sec. 6; Klutts v. Klutts, 5 Jones N. C. Eq., 80; statutes of the other States may be readily consulted on the subject of dower.

|| Dobson v. Taylor (1755), John Randolph's MS. Rep., p. 77; Claibourn v. Henderson (1809), 3 Hen. & M., 322.

¶ Scribner, vol. i., 386.

** Shoemaker v. Walker, 2 Serg. & R. (1816), 554.

The Nature of this Trust.—Of course different decisions and *dicta* may be found owing to the construction placed upon the language of different statutes which made the widow dowable in the equitable estate of the husband. Some of the courts have declared that in order to entitle the widow, his right in the lands must be of such a nature as to entitle him to demand and authorize a court of equity to decree a conveyance of the legal title.* This would be reasonable in the case of the vendor under a contract to purchase real property. In this case the vendor is treated as a trustee for the vendee, and the widow is dowable of this equitable interest. The vendee could pay the purchase-money, and call for the legal title; the widow and heirs could do the same thing.†

In the case of a *cestui que trust* of an express trust, perhaps the courts are not authorized to require as a condition requisite to obtain dower that the beneficiary should be entitled to a conveyance of the legal estate.‡ It was held in Georgia, that the wife of the vendee who held a title-bond was not entitled to dower.§ In that case, the court said: "Did this incomplete equitable title amount to seisin in him? It did not. For be the meaning of the word 'seisin' what it may, this much, at least, is certain, that the meaning includes in it this ingredient, viz., a title which is complete." This is holding to the English technical idea of "seisin" with a strictness which seems inconsistent with the idea that dower is highly favored by the law. Certainly in a court of equity the wife could assert her dower interest.

Because it was early settled in the English courts that where there were charges and incumbrances upon the husband's land, effectual against the wife, she had a right of redemption.|| This was the rule against the heirs or devisees of the husband, but not as a general rule against the purchaser from the husband. The statute of 8 and 9 Vict., ch. 112, § 2, changes this doctrine.¶

So it would seem upon principle, the relation of vendor and

* 1 Scrib. Dow., 388, § 24.

† For a full discussion of the right to dower, under executory contracts to purchase, see 1 Scribner, Dow., chap. 20.

‡ 1 Scribner, 388-9.

§ Bowen v. Collins, 15 Ga., 100.

|| Hitchens v. Hitchens, 2 Vern., 403; see 1 Scribner, 459, notes 1 and 2.

¶ Williams's Real Prop., 346; 1 Wash. Real Prop., 312, 313; see also Williamson v. Gordon, 5 Munf. (Va.), 257.

vendee, creating as it does the relation of mortgagor and mortgagee, the wife of the vendor should have a right to *redeem*. A vendor who makes a title-bond and retains the title therefor as security for the purchase-money, stands as though he had conveyed to the vendee, and then took a conveyance as a mortgage to secure the purchase-money. The vendee then becomes the mortgagor, and the widow can redeem.*

So, if the vendor, after entering into a contract of sale, conveys the land to a third person who has knowledge of the prior agreement, or who does not part with a pecuniary consideration, or who, for any other reason, is not a *bona fide* purchaser for value, such third person takes the land charged with the trust in favor of the vendee.† And the widow should be allowed substitution to the rights of the husband, and to redeem the same for the purposes of dower, if the heirs and others refuse to do so.‡ In New York, before the adoption of the revised statutes, the rule of the common law prevailed, and the wife was held not entitled to dower in lands in which the husband had a mere equitable estate. It is true the wife of the mortgagor was entitled to dower, because in that State the mortgagor was regarded as the *legal* owner of the estate.§

So, if lands are sold under a decree of court, and the purchaser entered into possession but died before receiving a deed, or paying the whole of the purchase-money, his widow was entitled to dower, subject to the payment of the purchase-money. If the debtor in the execution has one or two years in which to redeem the land, and die before redemption, and within the period allowed for redemption, the widow is entitled to dower, subject to the duty to redeem.||

The statute of Alabama giving dower in estates held in trust for the husband was held sufficiently broad to confer dower in the land purchased by the husband from the Indian reserve under the Creek Treaty of 1832, as soon as the contract is approved

* *Ellis v. Hussey*, 66 N. C., 501. † *Pomeroy on Specific Performance*, 530.

‡ *Bell v. Cunningham*, 83 N. C., 328.

§ *Scribner, Dow.*, vol. i., 406; *Collins v. Torrey*, 7 John, 279; *Hawley v. James*, 5 Paige, 452; 2 Paige, 377.

|| *Church v. Church*, 3 Sandf., ch. 434; 2 Hill (N. Y.), 303.

by the President of the United States.* The original Dower Act of North Carolina, in 1784, provided that the widow should be entitled to "one-third part of all the lands and tenements of which her husband died seised or possessed." And it was held that this act did not change the common-law rule, which required a seisin of the legal estate.† In 1828, however, a change was made, giving dower in the equity of redemption.‡ Under this statute we have seen, in *Thomas v. Thomas*,§ that dower in the equitable estate is not recoverable at law; that the demandant must proceed in equity.||

In *Thompson v. Thompson*,¶ dower was allowed at law in an equitable estate, acquired under an executory contract of purchase, although the purchase-money had not been fully paid. But this is a case in which the husband, on payment of the purchase-money, could have called for the legal title, and the widow could do the same thing. This is different from an *express trust* in favor of the husband. So in *Klutts v. Klutts*, the husband had bought the land at clerk and master's sale, and gave bond for the purchase-money, but died before the sale was confirmed, or the purchase-money paid. The sale was afterwards confirmed, and the purchase-money paid from the personal estate; the widow was held dowable.**

Now, Acts of 1868-9, 1869-70,†† restore the common-law right of dower in so far as to extend to all the lands *during the coverture*, and, among other provisions, it is enacted: "She shall, in like manner, be entitled to such estate in all legal rights of redemption and equities of redemption, or other equitable estate in lands, etc." And the courts of law being blended with courts of equity in that State, and this comprehensive statute, it would seem that the nice theory of the "*legal seisin*" is of no further practical importance in that State.

* *Parks v. Brooks*, 16 Ala., 529.

† See *Kirby v. Dalton*, 1 Dev. Eq., 195; *Taylor v. Parsley*, 3 Hawks, 125.

‡ 1 Revised Statutes (N. C., 1837); *Tyson v. Harrington*, 6 Ire. Eq., 329, 332; *Tyson v. Tyson*, 2 Ire. Eq., 137.

§ *Thomas v. Thomas*, 10 Ire. Law, 123.

|| 1 Scribner, 414 (notes).

¶ *Thompson v. Thompson*, 1 Jones Law, 430 (1854).

** *Klutts v. Klutts*, 5 Jones (N. C.) Eq., 80; 1 Scribner, Dow., 415 (notes). See, also, *Campbell v. Murphy*, 2 Jones Eq. (N. C.), 357.

†† *Battle's Revision*, ch. 117, § 2 (Constitution of 1868).

Tennessee adopted the North Carolina statute of 1784, in regard to dower, and prior to the amendment in 1823, the courts of that State placed the same construction on it, holding that it did not give the wife dower in equitable estates.* The Act of 1823 gave the widow in express terms dower in the equitable estate.

By the Revised Code of the District of Columbia, the widow is dowable of the trust estate. This was passed in 1857, but, prior to that time, the rule of the common law, excluding dower in trust estate, was in force in that part of the District which had been formed from Maryland.† On this point, Mr. Scribner says: "The statutes conferring dower in equitable interests are not uniform in the several States. In some of them it is required that the equity of the husband shall be perfect and complete, so as to entitle him to a conveyance of the legal title. In others, a less stringent rule is applied, and the widow may have dower in proportion to the interest which the husband has acquired in the estate by partial payments; always, however, subject to the lien of the vendor for the unpaid purchase-money."‡

The Right of Dower in Case of Equitable Conversion.—By a fiction of the court of equity, if money be agreed or directed to be laid out in lands, the same is considered as land. It is upon the principle enforced in these courts, that those things which are agreed or directed to be done, are regarded as having been actually performed.§ The English courts, prior to the Dower Act of 1834, held that the widow was not entitled to dower in this instance, but we think the determination was without reason or principle, but was the result of the tenacity of the English equity judges "to maintain the security of titles to real estate."||

The statute 3 and 4 Will. IV., ch. 105, worked a radical change in the law of dower, as has been stated.

The real property commissioners, who framed the law, in their

* Tipton v. Davis, 5 Hayw. (Tenn.), 278 (1818); 3 Hayw., 62, 68.

† Stelle v. Carroll, 11 Peters, 201.

‡ Scribner, Dow., vol. i., 417. See ch. 20 of this vol. of Scribner for a reference to the State decisions on this point.

§ 1 Lead. Cases in Eq., 598; notes to Fletcher v. Ashburner. See, also, Adams Eq. (4 Am. ed.), 136, with full notes on the subject of *Equitable Conversion*.

|| 1 Scribner, Dow., 434.

report say, among other things, in reference to the right of dower, that it shall extend to "*property considered in equity as real estate.*" But in the United States, where dower is allowed in the equitable estate, the right to dower in money impressed with the qualities of real estate, is established.*

And in those States which have no statutory provision in regard to the equitable estate, but where they regard the equitable doctrine of conversion in its full sense, the same results will generally follow.

Mr. Scribner says: "The American reports are barren of cases having a direct influence upon this particular phase of the subject." He refers to the case of *Potts v. Cagdell*,† but says it does not meet the point, as in that case the money was not directed to be invested in land. It would result, therefore, if real estate is agreed to be converted into personalty that the widow is not dowable.‡

The Right and Results of Election.—Where there is but a single individual in a fund, and that individual is competent in law to act, he can *elect* to take the land directed to be sold instead of its proceeds. And any clearly unmistakable act indicating a purpose to take the land in its original shape and dispense with the sale is sufficient. From that moment a reconversion is worked, and dower will attach. If several are interested in the fund, perhaps all should concur in the election, though a different rule prevails where money is directed to be vested in lands; in that case any one might elect to take his share in money.§

An infant cannot make a valid election, nor does his guardian possess the power to elect for him, although a court of equity might exercise the power of election for him. Of course, a lunatic is incompetent to make an election.

The Right to Dower in Mortgaged Estates.—After what has been said in regard to the statutes and adjudications in regard to

* 1 Washburn R. Property, 181; 1 Scribner, Dow., 437.

† *Potts v. Cagdell*, 1 Desaus., 454.

‡ *Berrien v. Berrien*, 3 Green Ch. R., 37.

§ 1 Scrib. Dower, 439; notes to *Fletcher v. Ashburner*, 1 Lead. Cases in Eq.; Jarman on Wills, ch. 19, p. 523 *et seq.*; Lewin on Trusts, 24 Law Lib., 679; *Fletcher v. Ashburner*, 1 Bro. C. C., 500; *Walker v. Denne*, 2 Ves. Jr., 182.

equitable estates, but little need be said in regard to mortgaged estates. For, until the passage of the English Dower Act, in 1834, the equity of redemption was held not liable to dower, for the reason that it was considered as a mere equitable estate. But on this point there was a great diversity of opinion, even before the Dower Act. This doctrine was carried so far in England, that actual payment of the mortgage debt at a period subsequent to the time when due, would not render the wife dowable, unless the property was reconveyed to the husband, during his lifetime. But the statutes in most of the United States now expressly confer dower on the wife in mortgaged property, and the practitioner is referred to Mr. Scribner* for late statutes and numerous decisions cited on this question. The limits of this work will not permit a complete reference to all these statutes and adjudications. What has been said in the preceding pages in regard to the charge of dower on equitable estates will apply to mortgaged property, because the rights of the parties and those interested in mortgaged property are generally administered in courts of equity.

The Wife of the Mortgagee not Entitled to Dower.—It would follow that under the American doctrine, and even the English chancery rules, that the wife of the mortgagee was not entitled to dower. It is true that by the strict common law, where the husband was the mortgagee, and the condition of the mortgage broken, the widow could recover at *law* by showing legal seisin in her husband under the mortgage deed. But courts of equity proceeded on a different rule, and held that the equity of the mortgagor extended against all persons coming in by every species of title, and consequently the widow of the mortgagee was subordinated to the right of redemption in the mortgagor. If, therefore, the mortgage had been redeemed, the courts of equity would interpose and restrain the widow of the mortgagee from prosecuting her *legal* right of dower, because the failure of the condition of the mortgage was treated as a penalty on the mortgagor which a court of equity would relieve, upon the maxim, "once a mortgage, always a mortgage." In other words, the

* 1 Scribner, Dower, ch. 22.

court of equity did not consider the time fixed for the payment of the mortgage debt as of the essence of the contract.*

On the previous pages, in speaking of the widow's right to dower under an executory contract to purchase, we have touched the doctrine of the widow's right to redemption. But as we have now touched the subject of mortgages more is required to be said.

The Widow of the Mortgagor can Redeem.—Out of this right to redeem several questions may arise. This right of course exists as against the mortgagee. In *Wheeler v. Morris*,† the court say the widow of a mortgagor “is directly and immediately interested in the payment of the mortgage debt; that, so long as the title of the mortgagee has not been made absolute by a foreclosure, which is effectual to cut off that equity, she is entitled to pay the debt and take dower in the premises; that although she cannot set up a claim to dower as against the mortgagee, to impair or defeat the mortgage, she may avail herself of the right which she has, even at law, as against all others, in any mode not inconsistent with, but in affirmance of the mortgagee's interest, and in equity may seek redemption.” Of course, she must redeem the whole debt, as the mortgagee has the undoubted right to have the entire debt paid. This principle is too obvious to require the citation of authorities.

How, when the Mortgagee obtains the Equity of Redemption.—In some instances, when done fairly and without fraud, the mortgagee may purchase or obtain a release of the equity of redemption, when the equity of redemption becomes merged in the mortgage and converted into a legal estate.‡

* *Adams Eq.*, ch. 3, 110 (note 1); *Story's Eq. Juris.*, title “Mortgage,” 1 *Scribner, Dower*, 455; 4 *Kent*, 47; 1 *Wash. Real Prop.*, 163, § 15; *Code Dist. Columbia*.

† *Wheeler v. Morris*, 2 *Bosw.*, 524, 533. As to the American decisions, see note 1 to 1 *Scribner, Dower*, 461. A case might occur where a party who has paid off the mortgage debt might be subrogated to the right of the mortgagee. As, for instance, lands were purchased in common by two persons, who jointly executed a mortgage on the premises to secure the purchase-money, and one of them died, and the survivor paid off the mortgage, it was held that the latter in equity was entitled to be subrogated to the rights of the mortgagee to the extent of a moiety of the mortgage debt, which was paramount to the claim for dower by the widow of the deceased vendee.

‡ *Woodhull v. Reid*, 1 *Harr. (N. J.)*, 128; *Thompson v. Boyd*, 1 *Zab.*, 58; *Dexton v. Harris*, 2 *Mason*, 531 (opinion of Justice Story); *Van Dyne v.*

Merger is said by Mr. Preston to be a conclusion of law upon the union of two estates. It takes place when a greater and lesser estate coincide and meet in one and the same person, as when a tenant for years obtains the fee; so, when legal and equitable estates unite, the equitable must merge in the legal. But it is suggested that many of the nice questions raised in the cases on this point are obviated by the legislation of the several States. If the wife is dowerable of the equity of redemption, she must join in the *release* of the same, otherwise she would not be bound. But if she joins with the husband, and submits to privy examination, this will pass her interest in real property.

Right of the Widow to be Reimbursed on Redemption by her.—If the widow has redeemed the property entirely, or if she has paid more than her proportionate share, she may take and hold possession of the mortgaged property, as against those whose duty it is to contribute, until she is reimbursed; and this is the general rule in the American courts.*

Where there is a sale and foreclosure after the husband's death, the statute of New York and several other States, and the District of Columbia, require the mortgagee to sell under the power of sale, or under a decree of a court of equity, and in any surplus which shall remain after paying the mortgage, costs, and charges, the widow is entitled to the interest on one-third part of the surplus for life as her dower. And in several reported cases it is held that, on a foreclosure, the widow of the mortgagor is entitled to dower in the *surplus*.†

In case of a sale the surplus represents the equity of redemption, and it is upon that surplus that dower attaches. Of course,

Thayre, 19 Wend., 162; in this latter case the wife did not join in the release, which was done during coverture; the wife, however, could not recover dower at law; she must proceed in equity.

* Swaine v. Perrine, 5 Johns. Ch., 482; Woods v. Wallace, 10 Foster's N. H. Rep., 388; Gage v. Ward, 25 Me., 101; Gibson v. Crehore, 5 Pick., 146; 20 Me., 111; 10 Paige (N. Y.), 49; 3 Blackf., 12. See 1 Scribner, Dower, 475-6 (notes).

† Titus v. Neilson, 5 Johns. Ch., 452; Hawley v. Bradford, 9 Paige, 200; Tabele v. Tabele, 1 Johns. Ch., 45; Mills v. Van Voorhis, 23 Barb., 125; Jennison v. Hopgood, 14 Pick., 345; Rutherford v. Munce (Miss.); Walker, 370; Hartshorne v. Hartshorne, 1 Green's Ch. (N. J.), 349; Smith v. Handy, 16 Ohio, 237; Harrow v. Johnson, 3 Met. (Ky.), Rep., 578; Keith v. Trapeer (S. C.); Bailey's Ch., 63.

if the proceeds of the sale only pay the debts, costs, and charges, the wife gets nothing.

Of the Foreclosure and Sale during the Husband's Lifetime.—It has been a question of some difficulty with the courts as, when on a foreclosure in the lifetime of the husband, the wife's inchoate right of dower attaches on the surplus. Some of the New York cases decided that her dower was cut off. But, subsequently, in the case of *Denton v. Nanny*, 8 Barb., 618, in an elaborate opinion, the Supreme Court of New York sustained the claim of the wife to have a proportion of the residuum of the sale invested in such manner as would secure the enjoyment of her dower interest in the event she survived her husband.

The contest over the surplus is likely to be between the wife, claiming the inchoate right of dower, and other creditors of the husband. In the case of *Denton v. Nanny* the creditors insisted that, as the land had been sold in the lifetime of the husband, the contingent right of dower of the wife was entirely extinguished. But the court, in refusing to sustain this position, said: "Are not the equities of the wife as strong as those of the husband? During coverture she is often without the means to pay the mortgage debt.

The only real protection which the court can extend to her, when the husband cannot or will not pay, is to give her the same right in the surplus proceeds, after the satisfaction of the mortgage, as she had in the mortgaged premises before the mortgage was executed. If the judgment-creditors can take the surplus, so may the husband. Their rights against the wife are no greater than his; and, if the whole surplus is to be handed over to them, then a husband, with ample means at his command, may suffer a foreclosure and sale, when the premises are oftentimes of greater value than the mortgage debt, for the express purpose of freeing the estate from the first claims of the wife."

The court further said: "Land has been sold in which the wife had a legal interest, which was not required to pay the mortgage debt. And upon the principle of equitable conversion the proceeds, so far as it respects her, must still be regarded as real estate."*

* The same doctrine was held in *Vortie v. Underwood*, 18 Barb., 562, which

The statutes of the District of Columbia, Virginia, and Kentucky, have conformed to this view of the law.*

But the principle is this, if property be subject to a charge or incumbrance, valid before sale, but subject to a superior charge, on which the property is sold, the surplus ought to stand subject to the inferior charge which existed against the property before the sale. Dower and homestead are among the charges which come within this equitable and just principle. On this theory, and that of the equitable conversion, the courts are competent to afford the relief without legislation. In case of dower the practice in some cases has been to place one-third of the surplus at interest for the benefit of the wife during her life.†

When the Wife should be made a Party to Foreclosure Suit.—According to what we have shown from the reason and authority on the question of the protection due the inchoate right of dower of the wife, it would seem to follow that, in all proceedings for a foreclosure in the lifetime of the husband, she should be made a party.

“The inchoate rights of the wife are as much entitled to protection as the vested rights of the widow.”‡ And the several cases in New York, referred to in the note, have established the proposition that, if the wife is not made a party to a bill for foreclosure in the lifetime of the husband, the purchaser takes the property subject to the incumbrance of dower. If the mortgagee or purchaser gets into possession, however, either by a forfeiture of the condition or a decree of foreclosure, he can hold against the wife, unless she redeem the land. But, at the death of the husband, the vested right of dower would attach. In addition to the right she has to the surplus, another reason is given why she should be a party to the proceedings for foreclosure. Sometimes the mortgage conveys several parcels of land, and she has a right to

followed the case of *Denton v. Nanny*, 8 Barb., 618. As to Virginia, see *Heth v. Cocke*, 1 Rand., 344.

* Rev. Code Dis. Columbia (1857), ch. 70, p. 301, § 17; Code of Virginia (1849), p. 474, § 3; Rev. Stat. Kentucky, Stanton's Rev., vol. ii., p. 26, § 6. See *Wilson v. Davidson*, 2 Rob. (Va.), 398.

† *Tabele v. Tabele*, 1 Johns. Ch., 45; *Reed v. Morrison*, 12 Serg. & R., 18, 21.

‡ 1 Scribner, Dow., 484, and notes. See, in accord, *Bell v. Mayor of New York*, 10 Paige, 49, 56; *Wheeler v. Morris*, 2 Bosw., 524; *Mills v. Van Voorhis*, 23 Barb., 125; *Denton v. Nanny*, 8 Barb., 618; 5 Paige, 38.

ask that such parcels shall be sold (if sufficient to pay mortgage), as will best protect her inchoate right of dower.

The general principles which entitle her to be made a party are stated by Judge Story, namely: "That the rights of no man shall be finally decided in a court of justice, unless he himself is present, or, at least, unless he has had a full opportunity to appear and vindicate his rights."* If the foreclosure or decree has been made without the wife being made a party, the rights of the parties become more complicated, as the foreclosure is valid as to all, except the undivided third interest to which the inchoate right of dower attaches. This question is discussed in *Bell v. Mayor of New York*.†

Massachusetts has a statute which bars the widow's dower where the mortgagee has entered after breach of condition, and held for three years, with actual notice to the dowress of the purpose of holding to work a foreclosure.‡

Whether the Widow can have the Mortgage Satisfied out of the Personalty in Exoneration of the Dower Interest.—The English doctrine seems to allow the widow to compel the application of the personal estate in exoneration of the dower interest, and such is the doctrine in some of the States, to wit: Vermont, South Carolina, Maryland, Kentucky, Rhode Island, North Carolina,§ and, perhaps, others. But, says Mr. Scribner, the weight of authority in the United States seems to be against the English doctrine, and in conflict with the decisions in some of the States here noticed. The courts of Massachusetts, Pennsylvania, New Hampshire, New York, New Jersey and Virginia enforce a doctrine different from the English view.||

* Story, Equity Pleading, § 72.

† *Bell v. Mayor of New York*, 10 Paige, 49. See 1 Scribner, Dow., 485 as to the mode of calculating the wife's interest.

‡ Rev. Stat. Mass. (1836), p. 634. See, also, *Gibson v. Crehore*, 5 Pick., 146; *Lund v. Woods*, 11 Met., 566.

§ Vt. Rev. Stat., 289; *Hanegan v. Harelee*, 10 Rich. Eq., 285; *Keckley v. Keckley*, 2 Hill (S. C.) Ch., 250; *Mantz v. Buchanan*, 1 Md. Ch. Decis., 202; *Harrow v. Johnson*, 3 Met. (Ky.), R., 578, 581; *Mathewson v. Smith*, 1 Angel (R. I.), 22, 25; *Campbell v. Murphy*, 2 Jones (N. C.), Eq., 357. As to English rule, see *Park on Dow*; 1 Scribner, Dow.; *Gilb. Uses*, 407.

|| *Scott v. Hancock*, 13 Mass., 162, 166; *Bird v. Gardner*, 10 Mass., 364; *Gibson v. Crehore*, 3 Pick., 475, 481; same in *Indiana*; *Whitehead v. Cummins*, 2 Carter, 58; *Rossiter v. Cossit*, 15 N. H., 38, 43; *Hawley v. Bradford*, 9

If the Mortgage is Redeemed by a Party holding a Lien Superior to Dower, the Widow must Contribute.—On this point, the American decisions have been quite contradictory, but it is considered now as settled that, if the mortgage incumbrance has been redeemed by a lien, which was superior to the dower interest, the widow must contribute her ratable proportion before she can be endowed of the estate.*

This question came up in 1821, during Chancellor Kent's time, in New York. It arose in the case of *Swaine v. Perrine*.† Chancellor Kent said: "The plaintiff (widow) was a party to the mortgage to Dunn, and her claim to dower was only in the equity of redemption, or the interest which her husband had remaining in the land, after satisfaction of the mortgage. Her right of dower was subject to the mortgage, and, if the heir has been obliged to redeem the land by paying that mortgage, to which the plaintiff was a party, she ought in justice and equity to contribute her ratable proportion of the moneys paid towards redeeming the mortgage. The redemption was for her benefit, so far as respected her dower. To allow her the dower in the land, without contribution, would be to give her the same right that she would have been entitled to, if there had been no mortgage, or as if she had not duly joined in it. It would be to give her dower in the whole absolute estate in the land, when she was entitled to dower only in a part of that estate."

Here the heir had redeemed, and the doctrine announced carries with it a reason that is difficult to resist.‡

If the mortgage is redeemed in the lifetime of the husband, the authorities, though few, do not agree. Mr. Washburn, in his

Paige, 200; Clancy, Husband and Wife, 589; *Holmes v. Holmes*, 3 Paige Ch., 363; *Hinchman v. Stiles*, 1 Stockt. Ch. (N. J.), 361; *Daniel v. Leitch*, 13 Gratt., 195; 37 Me., 509.

* 1 Scribner, Dow., 495.

† *Swaine v. Perrine*, 5 Johns. Ch., 482, 491 (note). For a full discussion of this doctrine, with all the contradictory adjudications, consult 1 Scribner, Dow., ch. 24, secs. 1 to 21. The widow must contribute where the lands are subject to a charge created by deed or will. See *Clough v. Elliott*, 3 Foster, 182; *Copp v. Hersey*, 11 Foster, 317; 1 Scribner, Dow., 508, § 20.

‡ See *Law Reporter*, vol. xii., pp. 165, 167; *Niles v. Nye*, 13 Met., 135; *Cass v. Martin*, 6 N. H., 25; *Pyncheon v. Lester*, 6 Gray, 314; *Hastings v. Stephens*, 9 Foster, 564; *Simonton v. Gray*, 34 Me., 50; 12 Leigh, 264. See note (5) to 1 Scribner, Dow., 508.

work on *Real Property*, maintains that the widow is not bound to contribute where the mortgage has been redeemed in the lifetime of the husband, but Mr. Scribner, on examination of the authorities, is inclined to decide the other way, and suggests that no good reason exists why the widow should not contribute as well where the incumbrance is redeemed in the lifetime of the husband, as where the redemption occurs after his death. And, as a reason, he says: "The equity of the purchaser, upon which this principle is founded, appears to be as strong in the one case as the other."*

There are many incidental questions arising when the widow is required to contribute, such as the extent to which she must contribute, and when the holder of the equity has procured an assignment of the mortgage, and as to her right to redeem against the holder of the equity who fails to redeem, but our limits forbid further discussion at this point.

If, however, the mortgage is satisfied by the husband in his lifetime, or by some one acting for him, the widow is entitled to dower, as the mortgage is satisfied in her favor.† The payment of the mortgage by the administrator of the husband will let the widow in for dower.‡

The Lien of the Vendor is Superior to the Right to Dower.—The equity of the vendor's lien, as recognized in England, is repudiated in some of the States, so that if the vendor makes a deed before the purchase-money is paid there is no lien, but the inchoate right to dower attaches. Therefore, if the vendor wishes to enforce payment out of the land, he must retain the title and enter into an executory contract to convey on payment of the consideration. He stands, then, in the position of a mortgagee, and the widow of the vendee must pay or redeem, as heretofore shown, if she would assert her right to dower. In those States where the English doctrine of the vendor's lien prevails, in the courts of equity the right to dower is subordinate to this lien, although a deed may have been executed.§

* 1 Washburn, R. Property, 186, § 21; 1 Scribner, Dow., 509.

† Brown v. Lapham, 3 Cush., 551; Bolton v. Ballard, 13 Mass., 227; Carter v. Goodin, 3 Ohio Stat., 75; Barker v. Parker, 17 Mass., 564.

‡ Hildreth v. Jones, 13 Mass., 525; Gibson v. Crehore, 3 Pick., 475.

§ Warner v. Van Alstyne, 3 Paige, 513; McArthur v. Porter, 1 Ohio, 99;

This right of the vendor's lien is recognized in New York, Maryland, Virginia, Tennessee, Mississippi, Georgia, Alabama, Kentucky, Texas, and perhaps one or two others. But it is rejected in Pennsylvania, North Carolina, Maine, Vermont, the latter regulated by statute. It seems that in other States, as Connecticut, Delaware, and Massachusetts, the question is in doubt.*

If the vendor take bond and security for the purchase-money, and makes a deed to the purchaser, no lien exists and dower attaches. If the land is brought to sale by the enforcement of the vendor's lien, either before or after the death of the husband, the purchaser takes the title free from the claim to dower. If sold after his death, the widow may claim dower in the surplus. Perhaps she could, under certain circumstances, claim her inchoate right when the sale is made before the death of her husband.

It has been held that, in order to divest the dower, the vendor must rely on his equitable remedy, expressly founded on this equitable lien. That if, instead, he take judgment at law against the husband, or his personal representative, and then levy and sell the lands in satisfaction of the judgment, the widow may claim dower as of an unincumbered estate.†

Of Lands held in Copartnership.—When real estate is bought with copartnership funds and conveyed to the copartners, a very interesting question has been made and discussed elaborately in

Fisher v. Johnson, 5 Ind., 492; 14 Ind., 254; *Willet v. Beatty*, 12 B. Mon. 172; *Ibid.*, 261; *Williams v. Woods*, 1 Hump. (Tenn.), 408; *Blair v. Thompson*, 11 Gratt., 441; *Wilson v. Davisson*, 2 Rob. (Va.), 384; *Meigs v. Dimock*, 6 Conn., 458; *Thompson v. Cochran*, 7 Hump., 72; see 1 Wash. Real Prop., 508, note; 1 Scribner, Dower, 530 (note 2).

* See Hare & Wal., notes, 1 Lead. Cases in Eq., 270.

† *McArthur v. Porter*, 1 Ohio, 99, 101. As to the effect of the vendor's failing to enforce his equitable right upon a bond for title as against the widow of the vendee, see *Thompson v. Thompson*, 1 Jones N. C. Law, 430.

In *Caroon v. Cooper*, 63 N. C. Rep., 386, it was held that the widow is entitled to have dower assigned out of the whole tract, and where the purchase-money is unpaid, she cannot be called upon to contribute until it is ascertained that the remaining two-thirds and the reversion in the one-third covered by her dower is insufficient to pay the incumbrance.

So, where there was a charge on the land by the will of the ancestor, on the death of the devisee the widow takes *cum onere*, but entitled to *exoneration*. *Smith v. Gilmer*, 64 N. C., 546; in accord, *Ruffin v. Cox et al.*, 71 N. C., 253.

the courts as to whether this land is considered as personal estate or as real property. If personalty, of course the question of dower is out of the way as between the widow of a member of the copartnership and the creditors of the company, or between her and the rights *existing* between the several partners. On this subject, Mr. Scribner says: "The following propositions seem to be established by the American decisions:

"*First.* That real estate purchased with partnership funds, for the use of the firm, is, in equity, chargeable with the debts of the copartnership, and with any balance that may be due from one copartner to another upon the winding up of the affairs of the firm.

"*Second.* That as between the personal representatives and the heirs at law of the deceased partner, his share of the surplus of the real estate of the copartnership, which remains after paying the debts of the copartnership, and adjusting all the equitable claims of the different members of the firm as between themselves, is treated and considered as real estate. Of his share of the surplus thus created and considered as real estate, the widow of the deceased partner may claim dower."*

Some of the authorities hold that there must be an express agreement among the partners, stipulating that all lands thus acquired are to be held for the copartnership debts, otherwise the usual incidents of real estate attach and dower is allowable; while the reason and weight of authority is in favor of the idea that all lands purchased with partnership funds should be considered in equity as personal property, and that the rights of creditors of the firm, and the rights between themselves, are paramount to the claim of dower from the widow of a deceased partner. This seems to be sustained by both English and American authority.

* 1 Scribner, Dower, 536. And to sustain this view the following authorities may be cited: *Thornton v. Dixon*, 3 Bro. C. C., 199; *Greene v. Greene*, 1 Hammond, 535; *Richardson v. Wyatt*, 2 Desauss., 471; 1 Harper's Eq., 25; *Sumner v. Hampson*, 8 Ohio, 328, 364 (this is an elaborate argument); *Dyer v. Clark*, 5 Met. (Mass.), 562; *Burnside v. Merrick*, 4 Met., 537, 541; *Mattock v. Mattock*, 5 Ind., 403; *Hale v. Plummer*, 6 Ind., 121; *Galbraith v. Gedge*, 16 B. Mon., 631; *Loubat v. Nourse*, 5 Florida, 350; 20 Missouri, 174; see also, 1 Md. Ch. Decis., 420; S. C., 5 Gill., 1.

It is true, that in a case in New York,* it was determined that in the absence of any *express* stipulation of the partners that lands acquired by them should be applied in payment of partnership debts, that the lands of the firm are subject to dower.

This case had some support from the master of the rolls, Sir William Grant, in *Bell v. Phyn*.† Though it was said in this last case that the land was conveyed to the partners "to hold to them, their heirs, etc., as tenants in common."‡ In Mississippi§ the court to some extent adopted the doctrine of the New York case of *Smith v. Jackson*. In Virginia, too, it was held that, in order to exclude dower, lands must be acquired strictly as co-partnership property, and be held exclusively for copartnership purposes.|| The court of Virginia, in the case of *Pierce v. Trigg*,¶ went still further, and held that where land was purchased with partnership funds, and is held strictly for partnership purposes, it is to be regarded in equity as personalty for *all* purposes, and that no right of dower attaches, whether the firm be solvent or not. The argument was that the representative of the deceased can claim it only as stock, and as stock in trade it is *ex vi termini*, personal.

Of Dower in Lands Appropriated to Public Use.—"Of a castle that is maintained for the necessary defence of the realm, a woman shall not be endowed, because it ought not to be divided, and the public shall be preferred before the private. But of a castle that is only maintained for the private use and habitation of the owner, a woman shall be endowed."**

As to lands condemned under the right of eminent domain, as for public parks, public streets and roads, market-places, and even for railroads, the wife is not entitled to dower. This has been repeatedly settled in the United States, as will appear by the cases cited in the note.††

* *Smith v. Jackson*, 2 Edw., ch. 28-35.

† 7 Vesey, Jr., 453.

‡ Collyer on Partnership, 4 Am. ed., § 133, note.

§ *Woolridge v. Wilkins*, How. (Miss.), 360.

|| *Wheatly v. Calhoun*, 12 Leigh, 264.

¶ *Pierce v. Trigg*, 10 Leigh, 405.

** Coke Litt., 31, b.

†† *Gwynne v. Cincinnati*, 3 Ohio, 24; *Moore v. City of N. Y.*, 4 Sandf. (S. C.) R., 456; S. C., 4 Seldon 110; *Weaver v. Gregg*, 6 Ohio St., 547; *Little Miami R.R. Co. v. Jones*, 5 Weekly Law Gaz., N. S., p. 5; 1 Wash. Real Prop., 221, § 37; *Walker's Amer. Law*, 2d ed., 315; 17 Penn. Stat., 449; 11 Mo., 204; 12 Ind., 37; 13 Ind., 487; 9 Ind., 37.

Inchoate Right of the Common-law Dower.—The recent legislation in several of the States has given rise to many complicated and interesting questions as to the nature of this interest, and the rights of the husband and his creditors, also the power of the legislative department of the State to deal with these interests. It would seem that the legislature can change the law of dower at will—it could abolish the right, by an act operating prospectively. The legislature could not destroy a vested right.*

But if this right is anything, it is an interest in land capable of some estimated value. The interest that cut off all alienations by the husband during coverture except such as are subject to her dower interest at the death of the husband, must have some *tangible value*.

It is true, its final realization is not until the death of the husband, but it might be said that this contingent estate so incumbers the husband that it tends to keep the land subject to her enjoyment even during the life of the husband, which is a matter of valuable moment to her. It has been held that where a wife joined in the deed of conveyance of his lands, releasing her dower interest, in consideration of a conveyance to her of other lands, it was a valuable consideration, and she should be protected.† This inchoate right of dower is such an incumbrance as to be within the operation of a covenant against incumbrances.‡

There is no contract between husband and wife for curtesy or dower. Says the Supreme Court of North Carolina, in *Norwood v. Morrow*:§ “The interest the one gets, in the property of the other, the law gives for the encouragement of matrimony.”

* *Jackson v. Edwards*, 22 Wend., 498, 513.

† *Bullard v. Briggs*, 7 Pick., 533; *Quarles v. Lacy*, 4 Munf., 251; 2 Scribner, Dow., 7.

‡ *Prescott v. Treman*, 4 Mass., 627; (this view was doubted in the previous case of *Powell v. Monson & Brimf.* Man. C., 3 Mason, 347); *Shearer v. Ranger*, 22 Pick., 447.

§ *Norwood v. Morrow*, 4 Dev. & Bat. Law, 442; same in *Lawrence v. Simmons*, 1 Dev. & Bat., 13. That this inchoate right is of such interest as to constitute sufficient consideration on which the wife can enforce a contract, see *Gorlick v. Strong*, 3 Paige, 440; *Harvey v. Alexander*, 1 Rand., 219; *Blow v. Maynard*, 2 Leigh, 29, 47; *Caldwell v. Bower*, 17 Mo., 564; *Ward v. Crothy*, 4 Met. (Ky.), 59; *Nims v. Bigelow*, 45 N. H., 343; see 2 Scribner, chap. i.

If, then, under the common-law idea of dower, the wife has such an interest in lands constituting a substantial right, possessing the attributes of property, to be estimated and valued as such, what power has the legislature over this interest while it has its existence? The majority of the adjudged cases, says Mr. Scribner, have sanctioned the doctrine that inchoate dower rights are subject to the legislative power, and may be divested by its exercise. But he shows that this proposition is not consistent with reason and principle. He says: "It will not be pretended that an estate in fee created by deed can be divested by the legislative power, except for public use and upon just compensation. Neither will it be claimed that an estate in fee, created by force of the statute of uses, can be impaired by that power, except for a similar purpose.*"

"If the law invested the wife, upon marriage, with an absolute right in fee simple in a portion of her husband's lands, could that right be interfered with by subsequent legislation? For, it is universally held, that as soon as the inchoate right has been consummated by the death of the husband, it is beyond the reach of legislative action.

"And yet an absolute right of dower is as much a creature of the law as an inchoate right. The assumption, therefore, that inchoate dower may be abolished by law, because it is created by law, does not seem to be well founded; for, upon that principle, dower might be divested as well where it was consummate, as where it was contingent."† "These acts, abolishing dower, or modifying it to the prejudice of the wife, should, it is believed, be held to operate prospectively only."

The late English Dower Act makes no attempt, even by the British Parliament, to interfere with existing rights. This important question has very recently been settled in North Carolina, in favor of the inviolability of inchoate dower.‡

In that State, from 1784 to 1867, dower was allowable only in what the husband owned at his *death*, the common law being changed in 1784. But in 1867, the legislature *restored* the common-law right of dower, and on the 27th March, 1869, this act

* *Fletcher v. Peck*, 6 Cranch, 87; *Butler v. Palmer*, 1 Hill, 324.

† 2 Scribner, Dow., 18, 19.

‡ *O'Kelley v. Williams*, 84 N. C., 281.

was repealed. In this case, the husband acquired the land in November, 1867, *subsequent* to the Act of 1867, and *prior* to the repealing Act of 1869. The husband continued to own the land until October, 1876, when he mortgaged the same for a debt contracted in October, 1875. The wife did not join in the mortgage-deed. In pursuance of the power contained in the mortgage, the land was sold in 1877, which was bought by the plaintiff. The question was, whether the wife of the defendant was entitled to dower under the Act of 1867, that act being the law when her husband acquired the property. The marriage, too, took place in 1866. Judge Ashe, in delivering the opinion, says: "By the marriage of 1866, the wife of the defendant acquired only a right of dower in such lands as her husband might *die* seised and possessed of, depending on the contingency of surviving him. But, when the Act of 1867, restoring the common-law right of dower, was passed, she acquired a vested right in all the land her husband might be seised and possessed of during the coverture." This has reference, of course, to land acquired *after* the passage of the Act of 1867, as this land was acquired in November, 1867, *after* the act of the same year. The same court had decided, twelve years previously, in *Sutton v. Askew*,* that this act did not affect the rights of the husband, who was married *before* the passage of the Act of 1867, and, in the same case, they left it an open question as to whether the act applied to *after-acquired lands*, the marriage being *before* the Act of 1867. But, in the case of *O'Kelley v. Williams*, this question is met and settled in favor of the power of the legislature to give the dower to the wife under that act in *after-acquired lands*, the marriage being before the act. Consequently, it is held in this case, that the repealing Act of 1869 did not and could not, under the Constitution, affect the wife's inchoate right to dower, which had attached (to the after-acquired lands) under the Act of 1867. Judge Ashe says: "As to the lands acquired by the defendant in November, 1867, the wife's right of dower, though inchoate till then, attached to the land as soon as acquired, and then at once, by the operation of the act, became 'vested,' and was not affected by the repealing

* *Sutton v. Askew*, 66 N. C., 172.

Act of 1869, for a 'vested right' cannot be destroyed by a subsequent repealing statute." He quotes from Justice Reade, in *Sutton v. Askew*, who said: "We by no means subscribe to the doctrine that a right, vested by operation of law, is less inviolable than when it arises from contract; where it once exists, no matter how, it is inviolable." When the land was acquired in 1867, the husband took it subject to the laws existing at the time; the law of the place, at the time of making the contract, becomes a part of the contract, as if it were expressly referred to, or incorporated in its terms.*

The same principle applies to the acquisition of real property, whether it comes by purchase or inheritance. So, dower was allowed the wife in this case.

If this opinion is good law, and we think it is, then the inchoate right to dower is such a right in property as the legislature cannot destroy. For the Act of 1867, by repealing the Act of 1784, simply made dower in North Carolina what it was by the common law, untouched by the Act of 1784. It is called a "vested" right, and this was held to be the law in several adjudicated cases† before this time. But the North Carolina adjudications were not made when Mr. Scribner wrote, hence we have not the advantage of his views on these cases, but they coincide exactly with the opinion expressed by him on pages 17 to 23 of his second volume.

He says: "By the common law, when lands are conveyed to the husband, the contingent interest of the wife is held to be impliedly embraced in the grant, and a provision that she shall not have dower is considered as repugnant thereto, and, therefore, void. In respect to the interest thus invested in the wife, by virtue of the conveyance to the husband, she has been regarded as a purchaser, and, as such, entitled to the benefit of statutory privileges extended to alien purchasers."‡

* *Van Hoffman v. Quincy*, 4 Wallace, 452.

† As to the right being a "vested" right, see *Kelley v. Harrison*, 2 Johnson's Cases, 29; *Royston v. Royston*, 21 Ga., 161; *Moreau v. Detchmندی*, 18 Mo.; see 2 Scribner, Dower, pp. 17 to 23.

‡ *Sutliff v. Forgey*, 1 Cowen, 89; also, 5 Cowen, 718, where the same case was affirmed in the New York Court of Errors.

As to the States and adjudications opposed to this view, see *Lawrence v. Miller*, 1 Sandf. (S. C.), 516; *Merrill v. Sherburne*, 1 N. H., 199, 214; *Barbour v.*

The wife is as much a purchaser of the right of dower as the husband is, seised of the fee.

The note refers to *Sutliff v. Forgey*, which construed the New York statute of 26th March, 1802, providing that all purchases of land made by an alien, who had come into that State and become an inhabitant thereof, should be valid in law, and he could dispose of the same and hold the same to his heirs and assigns forever. The act also authorized the alien inhabitant to take and acquire by devise or descent. The object was to encourage aliens to settle in the State. Sarah Sutliff and her husband, Richard Sutliff, were aliens, but came to New York and resided until 1830, when the husband died. The husband had been duly naturalized in 1803, and in 1804 he became seised of the lands. The widow demanded dower, and it was urged that she was an alien. The widow contended: 1. That the naturalization of the husband removed her disabilities. 2. That the Act of 1802 embraced the acquisition of the contingent estate of dower.

The first proposition was not sustained, but the second proposition was sustained in the Court of Errors.

The difficulty was, the statutes only authorized the alien to acquire lands by purchase, devise, or descent, which words it was admitted did not include the claim of dower. The court, Woodworth, J., held that the wife "was authorized to purchase, but a purchase cannot be effected by her except through the medium of her husband." He says further: "The right to dower is an interest in lands. When the conveyance was made to the husband, in 1804, this interest was contingent, it is true, but it was a right known and recognized by the law, and became absolute on the death of the husband. The wife was purchaser of this right of dower as clearly as that the husband became seised of the fee." This case would seem to settle the idea that in those States where common-law dower is recognized, that *when* the husband, at any time during the coverture, becomes *seised*, the wife instantaneously has an *interest* in the land, and it is of such a "vested" character that it is not competent for the legislature to impair or destroy it.

Barbour, 46 Me., 9; Phillips v. Disney, 16 Ohio, 639, 654; Noel v. Ewing, 9 Ind., 37; Strong v. Clem., 12 Ind., 37; Lucas v. Sawyer, 17 Iowa, 517; 11 Mo., 204; 8 Clark (Iowa), 132.

But it should not be forgotten that we are speaking of *common-law* dower, not of dower *ad ostium ecclesiæ*, nor of dower *ex assensu patris*, nor of *statutory* dower.

In dower *ad ostium ecclesiæ*, the husband, "after affiance made," could endow his wife of a certain portion of his lands, to take effect at his death. Dower *ex assensu patris*, was where the father, being seised, allowed his son at the time of spousal to endow his wife of a certain portion of such estate. In these two classes of dower it is clear that the wife has a *vested* right which could not be affected by legislative action; she holds under a *contract* with the husband, which relieves the objection made to the inchoate common-law dower that the wife does not hold by *contract*, and, therefore, no "vested" right.

But, as has been shown, the legislature has the power to modify or destroy dower altogether, if not applied retrospectively; and it has been shown that several of the States have so far changed the dower law as to give the wife dower only in such lands as the husband may own at his *death*. This *statutory* dower confers the unlimited disposition of the land to the husband during his lifetime, and he may die without being seised of lands, and the widow has no remedy. Now, it is suggested, that this inchoate right of dower in a *statutory* law of this kind, is not a "vested" interest, beyond legislative control.

Perhaps the legislature could abolish this in the lifetime of husband and wife. In this dower, the estate depends upon more than one contingency. She may or may not get dower at the death of the husband, dependent always upon whether he *owns* land at his death. A right so precarious could not be a "vested" right. Reasons of this kind may have induced a *restoration* of the common-law dower in some of the States, notably North Carolina.

Legislation Affecting the Husband's Rights.—As reference has been made to the Act of 1867, in North Carolina, *restoring* the common-law right of dower, it may be well to notice an important question raised in *Sutton v. Askew*, under that act.*

This case also decides that the wife's inchoate dower right under the statutory Dower Act of 1784, was not such an interest as would

* *Sutton v. Askew*, 66 N. C., 172.

constitute a *consideration* upon which the wife could enforce a contract. In that case the judgment debtor (the husband), J. A. J. Askew, in 1870 was the owner of two certain lots and houses, and borrowed of one Holley one thousand dollars. To secure the payment of this sum Askew proposed to execute a mortgage on these lots and houses. Holley was disinclined to take the mortgage as security without Mrs. Askew would join in the execution of the mortgage. Mrs. Askew refused to release dower except on the stipulation with her husband and Holley that she should have the overplus which might result from a sale under the mortgage. This was agreed to, and she executed the mortgage with her husband to Holley. The property was afterwards sold by the trustee for \$3400. The mortgage-deed to Holley was made before Sutton, the plaintiff, obtained judgment against Askew. This was a supplemental proceeding by Sutton for satisfaction of a judgment held against the husband, Askew. Mrs. Askew resisted the proceeding, on the grounds of her contract securing the inchoate dower interest. Now the common-law Dower Act was passed in 1869,* and Askew was married before that time, and was also seised of the property before 1869.

The question was, whether the Act of 1869, restoring the common-law right of dower, prevents a husband from selling lands which he owned before the passage of that act, the marriage being before the act also. The question was decided that the act had no effect retrospectively. Before the Act of 1869, the husband could freely sell his lands at pleasure without the consent of his wife. Justice Reade, in the opinion, says: "Since 1784, and until the act aforesaid, 1868-9, a widow was entitled to dower in the lands only of which the husband died seised and possessed; and, therefore, but few questions have arisen in our State in regard to dower rights, and none probably in regard to inchoate dower rights. But the important change which that act (1868-9) made involves the subject in much uncertainty, and will breed much litigation.

"What adds to the uncertainty is, that the different States have different laws in regard to dower, and the decisions in the

* The Dower Act was passed in 1867, repealed in 1868, and then restored in 1869. And as the marriage and ownership of the land both existed prior to 1867, it is sufficient to discuss the case in reference to the Act of 1869. Strictly, the acts are 1866-7, 1868-9, 1869-70.

State courts are numerous and conflicting. Some of the decisions holding that acts like ours are retroactive, and others holding them prospective only. And the reasons which would be proper in one case are inconsiderately used in the other." He quotes what Scribner had said, in speaking of the *inchoate* right of dower, as follows: "A certain vagueness of expression uniformly characterizes the discussion of the subject, and these discussions are commonly attended with unsatisfactory results."

In speaking of the husband's rights, Justice Reade then says: "Has the husband no rights which are entitled to respect, and which the legislature cannot destroy? Before the late act, when a man married, owning land, his wife had an *inchoate* right to dower, contingent upon his not conveying it away in his lifetime and upon her surviving him, precisely the same as if it had been conveyed to him by deed from another, with such stipulations and conditions. Suppose it had been so conveyed to him, could the legislature step in and alter his title, or change the condition? No one will so contend. Well, what matters it how his title was derived, and how the conditions and stipulations came about, so that in fact they existed? Here, then, was the simple case of a man owning a tract of land absolutely and in fee simple, with full power to sell the same, subject only to the condition that if he did not sell it, and should die seised and possessed of it, his wife would have dower; and the legislature steps in and forbids him to sell, compels him to hold it as long as he lives, and gives his wife dower in it, in spite of him. If this be not depriving him of his vested rights, taking his property from him and giving it to another, under the notion, as is said, of the 'paramount public good,' without compensation, then we cannot understand what would be an instance of such a violation of the rights of property.

"It would, probably, be no great hardship upon the husband married before the act; and it would, probably, not interfere with his vested rights to allow the act to operate upon all lands *acquired after* the passage of the act, because he would have notice of the incumbrance which would attach, and he would take *cum onere*. But, as to this, we give no opinion."*

* In *O'Kelley v. Williams* (1881), 84 N. C., 281, this question, as to *after-acquired* lands, is decided in favor of the right to dower attaching. And, also, that it was not affected by the repealing Act of 1869.

And the judge, in this opinion, says: "And so it may be that, in all cases of marriages *since* the passage of the act, the wife may refuse to join in the conveyance unless she is compensated, and an agreement to give a part of the sale-money for her consent to the sale may be good, her dower right attaching to *all* the lands of her husband, and contingent only on her surviving him,—a reasonable probability, and not a mere possibility. And, *quære*, whether the legislature, by any subsequent act, can deprive her of this right? But these are not questions before us." But we must not omit what is said as to the *inchoate right* constituting no consideration in this case.

The court further says: "The Act of 1868–9 comes and changes the law of dower, so as to give the widow dower not only in all the husband owns at the time of his death, but in all that he owned during coverture; but this act does not affect rights or marriages which existed *before* its passage; they stand as they did before the act, when the husband could sell without the consent of the wife, as in this case, *was immaterial, and afforded no consideration to support the contract.*" The court adverted to the general doctrine that, where the wife makes a claim of this kind, it ought to appear that she had released the dower, or covenanted against incumbrances, and suggests a query, if in any case, this release of dower could be established by parol, when not set out in the deed, and when the fairness of the transaction did not appear. But, while that did not appear in this case, they say the view taken of the case made these questions unnecessary.

The effect of this decision was to make the Act of 1869 void as to the husband and as to his creditors, for in this case the creditor was the party contesting the wife's right. Judge Dick (Rodman concurring) delivered a dissenting opinion; but the argument and authorities quoted went to prove that the inchoate right of dower was subject to legislation, which was not a point in the case. The case was that of an act *enlarging* the dower rights, and the question was as to its effect upon the rights of husbands and their creditors whose rights had *vested before* the date of the act. Then the real idea contained in the majority opinion is "bolstered up" by the argument of Judge Dick in the *dissenting* opinion. The opinion holds that so slight and unsubstantial was the inchoate dower interest under the Act of

1784 (being dower of lands owned at the death), that it *was no consideration for a promise to the wife*, while the point in the dissenting opinion seems to be to show that the same inchoate right is of such a nature that the legislature can destroy it at will.

It is true the dissenting opinion refers to Scribner and others, who say that, if the wife have inchoate right of dower, it is a sufficient consideration in a release of the same to sustain a contract against the party; but it does not appear whether these cases had reference to the *inchoate common-law dower*, or the *inchoate statutory dower*. This distinction being unobserved may be the cause of so much confusion in the decisions and among the text writers, because there is strong reason and principle to sustain the proposition that, under the operation of the common law, the wife has such an inchoate right as to partake of the nature of a "vested" right, as decided in *O'Kelley v. Williams*,* and therefore not subjective to the legislative power.

But the legislature may provide, in acts operating prospectively, for such a modification of the law of dower; place the wife's rights on so many contingencies, until the right is a mere possibility; such a right as this may be so slender that the legislature may destroy the same at pleasure, and it may be that a dower act, which only gives the wife a dower, dependent upon his failing to dispose of the land in his lifetime, and the further contingency of her survivorship, confers too feeble an estate to be considered a "vested" right. There is a *dictum* in Judge Reade's opinion, which is in conflict with the very point he decides. He says: "Our conclusion from what has been said is that, before the late act (1869), a widow was entitled to dower in such lands as the husband shall die seised and possessed of, and in no other; that the right to be so endowed commenced (whether by the contract of marriage, or by operation of law, makes no difference) at the time of the marriage, but subject to the husband's power of disposition, and contingent upon his not selling it, and upon her surviving him, and that the legislature could not deprive her of the right, or in any way change it without her consent."

This is a *dictum*; this question had nothing to do with the

* *O'Kelley v. Williams*, 84 N. C., 281.

case. Then, again, the *dictum* would seem inconsistent with the point *decided*.

This dower right of 1784 was of such a substantial nature that the "legislature could not deprive her of the right, or any way change it without her consent," is held in the *point decided* to be so "trifling" (so to speak) that "*the consent of the wife is immaterial, and afforded no consideration to support the contract.*"

This is only one instance of the loose and totally unsatisfactory *verbiage* of many of the cases on the subject of the *nature of inchoate dower*. Some of the cases seem to be on a "strain," argumentatively, to sustain a certain policy, either politically or sentimentally, which is a curse to judicial deliberations.

Of Dower Consummate, but before Assignment.—Upon the consummation of the dower right, the widow has dower according to the place where the land is situate; thus: in Louisiana, the laws do not give dower, but, if the husband and wife are domiciled there, and the husband die, leaving lands in Massachusetts, the widow will have dower of those lands according to the law of Massachusetts.*

It need scarcely be stated, after what has been said on the *inchoate* right of dower, that when dower has become consummate, whether on assignment or not, it is so far a vested right as beyond legislative control.

The widow may generally take such interest in her husband's estate conferred by the law of the place in force at the time of his death.†

The Status of the Widow before Dower is Assigned.—Although the right to dower becomes consummate on the death of the husband, yet she has no freehold interest in the lands of her husband until dower is assigned, and it is said to present an anomaly in the rules of the common law.‡

Until dower is assigned, she has no seisin, no right of entry. She is not entitled to the undivided third of the entirety, but a

* Story, Conflict of Laws, §§ 448, 454; 1 Washburn, R. Property, 151, § 9; Barnes v. Cunningham, 9 Rich. Eq., 475; 2 Scribner, ch. 2.

† Hendrickson v. Hendrickson, 7 Ind., 13; Galbreath v. Gray, 20 Ind., 290; 11 Mo., 204; Johnstone v. Van Dyke, 6 McClean, 422; Lucas v. Sawyer, 17 Iowa, 517; 2 Scribner, Dow., ch. 1, § 21; ch. 2, § 3.

‡ 2 Scribner, Dow., ch. 2, § 4; Coke Litt., 37, a, n, b; Hilliard, R. Prop., 163, § 2.

third part in severalty, which cannot be ascertained until the same is assigned ; and, until such assignment, she cannot resist a recovery, and it will not constitute an outstanding title. According to the rules of the common law, a judgment will not vest the widow with the freehold ; she must make an actual entry after assignment.

The reason is quite apparent why a widow should have the assignment made before a right of entry accrues ; it would be injustice to the heirs for her to be the judge of what particular lands she should hold ; that, again, for her own benefit, she is not bound to submit to an undivided third of the entirety, but is entitled to one-third in severalty. This boundary must be determined either by the consent of the heir, or a judicial decree.*

In dower *ad ostium ecclesie*, or *ex assensu patris*, the rule was different, and the widow could enter immediately on the death of the husband, because the land with which she is endowed is made certain by the contract creating the estate. Before the assignment, it is not subject to levy and sale. Nor is it the subject of a valid grant in law, though in equity a transfer of the widow's interest will often be sustained in equity. This interest, before assignment, may be reached in equity by creditors.

It may be lost or extinguished by an award. The widow may institute proceedings to redeem before the assignment of the same.

For a full reference to the authorities upon the points indicated here, the student is directed to 2 Scribner, Dower, ch. 2.

The Widow's Quarantine.—The great charter of King John, in 1215, contains a provision that the widow "may remain in her husband's house forty days after his death, within which time her dower shall be assigned."† This privilege of the widow is called her *quarantine*. Lord Coke shows that before the conquest, the widow was entitled to remain a whole year in her husband's house.‡

* See the several cases, supporting the doctrine that the assignment must be made before widow has a freehold interest : *Branson v. Yancy*, 1 Dev. Eq., 77 ; *Smith v. Smith*, 13 Ala., 329 ; *Taylor v. McCracken*, 2 Blackf., 260 ; *Moore v. City N. Y.*, 4 Seldon, 110 ; *Johnson v. Morse*, 2 N. H., 48 ; *Carey v. Buntain*, 4 Bibb., 217 ; *McClanahan v. Porter*, 10 Mo., 746 ; *Scott v. Howard*, 3 Barb., 319 ; *Lamar v. Scott*, 4 Rich. L., 516 ; *Guthrie v. Owen*, 10 Yerger, 339 ; 1 Dev. & B., 213 ; 23 Ill., 81 ; 32 Me., 424 ; 12 Gray, 236.

† King John's Magna Charta, ch. 7. ‡ Coke Litt., 32, b. ; 2 Scribner, ch. 3.

How in the United States.—Many of the States have a statute regulating the widow's quarantine. In Virginia, Kentucky, and Florida, the widow is entitled to occupy and enjoy the mansion-house until dower is assigned. So in Rhode Island, except she is required to commence suit for dower within twelve months. In some States, two months is allowed, in others forty days, and in others ninety days, etc.

The quarantine only extends to such property as the widow is dowerable of. Thus it was held in Illinois,* that unimproved land, situate three miles from the farm occupied by the husband, is not subject to quarantine. So in Alabama, the husband resided in a town as a hotel-keeper; it was held that the widow had no right to quarantine in a plantation several miles from town.† In North Carolina, the quarantine does not extend beyond the land on which the husband has his chief house.‡ This, too, seems to be the rule at common law.§

The quarantine is good only against the heirs, or those claiming under the husband—she could not protect herself against adverse paramount title. Her position is no better than her husband's would have been. The heir cannot maintain trespass against the widow for damage on the quarantine before the assignment of dower. In North Carolina it was decided that where the widow, after the death of the husband, occupies his residence with the children, some of whom are of age, she is under no obligation to pay taxes accrued between the death of the husband and assignment of dower.||

By the common law, the widow forfeits her quarantine by a second marriage, though the rule is somewhat different in the United States, but not uniform. It has been held in Virginia and Alabama, that removal from the premises does not forfeit quarantine; that she may allow another to cultivate the same for her.¶ In Mississippi, however, it is held that quarantine is a personal

* *Hoots v. Graham*, 23 Ill., 81.

† *Smith v. Smith*, 13 Ala., 329.

‡ *Spencer v. Weston*, 1 Dev. & Bat., 213. In this State the law expressly provides that the dower shall include the mansion-house, etc.; *Battle's Revisal*, ch. 117, § 1.

§ *Magna Charta*, c. 7; *Thomas's Coke*, 584.

|| *Branson v. Yancy*, 1 Dev. Eq., 77.

¶ *McReynolds v. Counts*, 9 Gratt., 242; *Oakly v. Oakly*, 30 Ala., 131; same in Kentucky: *Burk v. Osborn*, 9 B. Mon., 579.

privilege that cannot be transferred, and that the heirs may maintain ejectment for the mansion-house against third persons claiming under the widow, before the assignment of dower.* At common law, if the widow was evicted before the expiration of her quarantine, by the heir, she had her writ *de quarantina habenda* to the sheriff, which was a summary process by which she was speedily restored to the possession, but the remedy in the American States is not very well ascertained. Mr. Scribner suggests that the statutes regulating forcible entry might apply.

At common law the right of the widow to occupy the premises, ceased at the expiration of the quarantine, and unless her dower had been assigned within that period, the heir may expel her, and compel her to resort to legal proceedings for the recovery of dower. The same rule was applied in New York.† The New York statute is very similar to *magna charta*, except it provides that the widow should not be liable for rent during the forty days, or period of quarantine. But Judge Kent says the provision in *magna charta*, which allowed the widow estovers or maintenance out of the estate, necessarily implied that she was to live free of rent. In North Carolina the widow is provided for one year's support, and it has been suggested that this was an enlargement of the quarantine.‡

Dower may be assigned without resort to legal proceedings. The heir, on whom the duty devolves, may proceed at once to set apart the dower, and if fairly done, is binding as if performed under a decree.

Several of the States have statutes providing for the mode of setting apart dower, and prescribe a mode for amicable proceedings. If the parties are under no disabilities their action and agreement would be binding as in other transactions.

Dower may be assigned in parol. When the widow enters she holds under the title of her husband, and nothing is required but to ascertain her share. It is said that the heir, though an infant,

* Wallis v. Smith, 2 Smedes & Marsh., 319.

† Coke Litt., 34, b.; 4 Kent, 61; Jackson v. O'Donaghy, 7 Johns, 247; Siglar v. Van Riper, 10 Wend., 414; but in several of the States, this rule is changed and the wife is allowed to remain until dower is assigned; see Statutes and authorities collected, 2 Scribner, Dow., chap. 3, § 23, notes.

‡ 4 Kent, 62, notes; Branson v. Yancy, 1 Dev. Eq., 77; Norwood v. Morrow, 4 Dev. & Bat., 448.

may assign dower, because he may be compelled to do so by suit, of which he could not take advantage when at majority, since the widow's title to dower is urgent, it being necessary for her immediate support.* But if the heir be a minor when the dower is assigned, the common law protects him, and supplies with a writ of admeasurement; so, if assigned by the guardian of the minor. If the heir is of age, and makes the assignment, he shall not have the admeasurement of dower.† In the United States, the remedy for partial or excessive allotment of dower, may be furnished in the court in which the proceedings are had. The usual practice is to except to the allotment, and the court may set the same aside and order a new assignment.‡

Assignment according to Common Right.—The assignment at common law, is one-third of the lands in severalty and by metes and bounds where it is practicable, to be held for her natural life. The heir should make the assignment, and then she is said to have dower assigned *according to common right*. See 2 Scribner, Dow., ch. iv., chap. 21.

Mode of Ascertaining the Proportion of the Widow, either in Allotment by Metes and Bounds, or as a Part of the Rents and Profits.—Sometimes the property does not admit of an assignment in severalty, from the nature of the property, when the assignment will be dispensed with. Thus, if the property be a mill, she may have one-third of the toll, or one-third of the profits, or the entire mill for every third month. So, if a ferry, one-third of the profits. If the property is indivisible, as frequently in houses and rooms in a city, she should have one-third of the rents, or a sufficient number of rooms to produce one-third of the profits of the whole estate.

In England the practice appears to be, where not assigned by metes and bounds, to ascertain the value of the land by reference to its actual income.§

* 2 Scribner, chap. 4, § 11; chap. 5, § 49; Roper, H. & W., 389; Young v. Tarbell, 37 Maine, 509; McCormick v. Taylor, 2 Carter (Ind.), 336; 2 B. Mon., 284; 1 Pick., 314.

† Park, Dower, 273.

‡ Hawkins v. Hall, 2 Bay (S. C.), 449; Stiner v. Cawthorne, 4 Dev. & Bat., (N. C.), 501; Eagles v. Eagles, 2 Hay, 181; 2 Scribner, Dow., chap. 28, § 12, note 1.

§ Peacock v. Evans, 16 Vesey, Jr., 516.

So, in several of the States.* In a city, where buildings are used mostly for rent, say the husband owned several houses, all yielding a certain annual rent, it would appear reasonably just to assign the widow, not one-third in value of the entire property, nor by *dividing each house*, but *that* number of houses, either *one* or *more*, which yield *one-third* of the rents of the whole, or pay a sum equal to one-third of the rents annually. Perhaps by estimating according to the market value of the property would approximate the same result. Land, like money, in some sense, is worth what it yields annually, one in the way of rents, the other in the way of interest.

In several of the States the statute provides that where the estate of which a woman is dowable is entire, and no division by metes and bounds can be made without injury thereto, dower shall be assigned in a special manner, as of a third part of the rents, issues and profits.† The mode of ascertaining the proportion of the widow in making an allotment of dower, is sometimes a difficult question, as found in the old books. It is not the *quantity* alone which enters into the question, but the widow should have an assignment of one-third in *productive* value. In the simple state of property in former times, the sheriff was required to assign to her a third part of each existing denomination of property; thus, one-third of each manor, if there were several, or one-third of the arable, one-third of the meadow, and one-third of the pasture. Without suit, the widow and heir could, by agreement, substitute a different assignment. This question has been adjudicated in several of the American States. In New York, Massachusetts, Maine, South Carolina, Kentucky, and others, it is held that she is entitled to one-third in *value*, and this is indicated by one-third of the *income* of the land.‡ In the case of *Leonard v. Leonard, supra*, the court of Massachusetts says: "In

* *Francisco v. Hendrix*, 28 Ill., 64; 23 Ill., 634; Stat. Mo., 1855; *Laws of Kansas*; 15 Mo., 331; *Atkins v. Kron*, 8 Ire. (N. C.), Eq., 1; Stat. Arkansas, 1858, p. 456, § 43; *Hyzer v. Stoker*, 3 B. Mon. (Ky.), 117; *Bank of U. S. v. Dunseth*, 10 Ohio, 18.

† 2 Scribner, *Dower*, ch. 23, § 2 (note 14).

‡ In the matter of *Watkins*, 9 John., 245; *Coates v. Cheever*, 1 Cow., 460, 476; *Leonard v. Leonard*, 4 Mass., 533; *Conner v. Shepherd*, 15 Mass., 164, 67; *Carter v. Parker*, 28 Maine, 509; *Taylor v. Lusk*, 7 J. J. Marsh. (Ky.), 636; *Smith v. Smith*, 5 Dana, 179; *Gibson v. Marshall*, 6 Rich. Eq., 210.

the assignment of dower, commissioners are to regard the rents and profits only of the several parcels of the estate out of which dower is to be assigned. When they have ascertained the annual income of the whole estate, they ought to set off to the widow such part as will yield her one-third of such *income*, in parcels best calculated for the convenience of herself and heirs. This rule is adapted equally to protect widows from having an unproductive part of the estate assigned to them, and to guard heirs from being left during the life of the widow without the means of support."

In Maine, the court says, in the case of *Carter v. Parker*:* "The widow is entitled to have such part of the land set out to her as dower, as will produce an income equal to one-third part of the income which the whole estate would produce if no improvements had been made upon it since it was conveyed by the husband."

In *Taylor v. Lusk*,† the widow objected to the assignment because the mansion-house was not included in the same, but the objection was overruled. The court said: "We perceive no sufficient reason for quashing the report because the mansion-house was not allotted to the widow. If she obtained an equal third-part in value of the land, it is all the law gives, and she cannot complain, no matter where it is laid off to her."‡ In the same State the court says, in the case of *Smith v. Smith*, 5 Dana, 179: "In assigning dower, regard should be had to the productiveness as well as to the value of the different parcels of the estate, and the allotment should include such as will yield the widow a fair share of the annual income of the whole. To allow her unproductive property only, as wild lands, a house without fields, and though it be one-third of the value, is neither just nor legal."

In support of the same views, is the Supreme Court of North Carolina, in the cases, *McDaniel v. McDaniel*, and *Stiner v. Cawthorne*.§

* *Carter v. Parker*, 28 Maine, 509. † *Taylor v. Lusk*, 7 J. J. Marsh., 636.

‡ Some of the States, as North Carolina, require by statute that the mansion-house shall be included in the allotment, but this, perhaps, will not prevent the rule contended for in the text, that one-third in *value*, not in *quantity*, should be assigned.

§ *McDaniel v. Mc. Daniel*, 3 Ire. Law., 61; *Stiner v. Cawthorne*, 4 Dev. & Bat. Law, 501.

When the property is indivisible, and the widow's share has to be a sum fixed, equal to one-third of the annual rents of the property, we can only expect an approximation to exactness. Indeed, this is so where a third of the land is assigned by metes and bounds, for the part assigned may fluctuate and change in the future, and, as compared with the other two-thirds belonging to the heir, it may become more or less valuable in future years. And it may be said with equal truth that where the estate is assigned according to the cash value of the land, the same uncertainty exists, for the property which is valuable to-day may next year be of much less value, owing to extrinsic causes. But this, the dowress, like other parties, must risk. It is generally supposed that the price of land will not depreciate so long as the rents and profits are equal to the interest on a fair cash valuation of the property. Nothing tends more to enhance the cash valuation of land than the yield of a fair rental value.

The difficulty of fixing a portion of the rents and profits to the widow is thus described by Ruffin, C. J., in the case of *Atkins v. Kron*.^{*} He says: "In the most of Europe, and, perhaps, in some parts of this country, the annual income, received in the form of rent, may be anticipated almost as certainly as interest on capital in money. The price, also, of the fee in possession, is much the same, take the country throughout, in the end, as at the beginning of the same life. But, in all these particulars there is the utmost uncertainty here, an uncertainty so great that no general rule for estimating the value of those different interests can be laid down, which would not do great injustice in, perhaps, more than half the cases which might arise.

"The income of land is seldom divided by way of rent, but of crops, from the cultivation of the owner; and, hence, the profits depend much upon what other capital the tenant has, besides the land.

"These profits, for a course of years to come, cannot be computed with any confidence. Besides, it is a fallacy to assume that the intrinsic value of the land, or the market value, will be the same at the beginning and end of the life-estate. We know that depends upon such a variety of circumstances, that there can be

^{*} *Atkins v. Kron*, 8 Ire. Eq., 1.

no positive rule. A rice swamp and other alluvial flats, being all cleared and prepared for successful culture, and of extraordinary fertility, may be so considered. But, in the hill country, and where tobacco or cotton are the crops, under the usual system of tillage by the greater part of our citizens, or even of those who are called prudent and successful planters, we know that in twenty-five or thirty years a plantation of ordinary size is so nearly cleared of its timber, and reduced by continued and exhausted cropping and detrition, as often not to be worth half what it was."

In the endeavor to ascertain the future profits of an estate, these considerations should be taken into account, and, at the same time, we are to take into consideration the great probabilities of an appreciation in value in those new and growing portions of the country. Proper deductions must be made for current repairs and taxes, and often insurance.

In the case of *mines*, belonging to the husband, and being often incapable of partition, the widow should have one-third of their annual value; or, she may have one-third of this annual value estimated in the lands assigned to her, on which there are no mines. Sometimes the widow may enjoy the mines for alternate periods.* But, in the case of *Smith v. Smith*,† it was held that where there is a mill and other improvements upon the same land, it is not indispensable for the commissioners to assign to the widow the third toll dish, or the whole mill every third month, third six months, or third year, as would be the case in an estate which is indivisible, as a mill only.

Sometimes the land is sold, and the purchaser not knowing that dower attached; in a case of this kind a court of equity might decree a sum in lieu of dower. Thus, in *Tennessee*,‡ real estate had been sold at chancery sale, and the purchaser, supposing he got a good title, placed valuable improvements on the land for manufacturing purposes, and it appeared afterward that the estate was subject to dower; it was held, on a bill filed by the dowress, that it would be inequitable for her to take the benefit of the im-

* 1 Roper, Husband and Wife, 397; *Stoughton v. Leigh*, 1 Taunt., 402; 2 Scribner, Dow., ch. 21, §§ 23, 27. See the rule discussed in *Coates v. Cheever*, 1 Cow., 460; *Hyzer v. Stokes*, 3 B. Mon., 117; *Stevens v. Stevens*, 3 Dana, 371.

† *Smith v. Smith*, 5 Dana (Ky.), 179; 2 Scribner, ch. 21, § 29, and notes, p. 557.

‡ *Lewis v. James*, 8 Hump., 537.

provements at the expense of the defendant, and it was held competent for the court to decree an annual payment in lieu of dower, which was done. The decree provided, however, that if at any time thereafter the works should cease to secure her the amount decreed, that then she should have her interest laid off by metes and bounds.

Provision for Widow where Land is Sold.—Great difficulty is presented when land is sold, subject to dower, and the proceeds brought into court, to apportion the same. In some cases, the sale is the result of proceedings founded on a claim paramount to the dower; then the question only arises as to the overplus. The question of difficulty in the ordinary cases is whether the widow is to take the *legal interest* on a proportion of the purchase-money, or a share of the *rents and profits*, as though no sale had been made.* Where there has been a foreclosure and sale under a mortgage, in which the widow joined, or where the sale is made to satisfy the vendor's lien, or judgment recovered prior to the attachment of the dower right, the widow is dowable of the surplus, after satisfying the claim of the creditor, and, if a gross sum is not paid to the widow in lieu of dower, the practice is to order one third to be invested, and the annual interest paid to her during life.† So in copartnership lands.

But, says Mr. Scribner: "In several of the States, however, the estimated value of the land is taken as the basis upon which the allotment is made to the widow.‡ Thus, in New York, in the case of *Hale v. James*, it was held by Chancellor Kent, that where it is agreed between the widow and the tenant, that he shall allow her a yearly sum, instead of having the dower assigned to her according to law, the interest of the value of the premises at the time of the alienation by the husband, is the proper measure

* 2 Scribner, Dow., ch. 23, § 13.

† *Titus v. Neilson*, 5 Johns. Ch., 452; *Denton v. Nanny*, 8 Barb., 618; *Mills v. Van Voorhis*, 23 Barb., 125; *Hartshorne v. Hartshorne*, 1 Green Ch., 349; *Hinchman v. Stiles*, 1 Stockt. Ch., 361; 16 Ohio, 237; 3 Met. (Ky.), 578; Scribner, Dow., vol. i., ch. 23, § 25; *Klutta v. Klutta*, 5 Jones Eq. (N. C.), 80; *Williams v. Woods*, 1 Hump., 408; *Thompson v. Cochran*, 7 Hump., 72; 3 Paige, 513; 6 Dana, 204; 12 B. Mon., 172; *Daniel v. Leitch*, 13 Gratt., 195; 8 Blackf., 174; Scribner, vol. ii., ch. 24; *Goodburn v. Stephens*, 5 Gill., 1 S. C.; 3 Bland, ch. 269.

‡ *Hale v. James*, 6 Johns. Ch., 258; *Beaver v. Smith*, 11 Ala., 20; 12 Ala., 112; 15 Ala., 810.

of the annuity." So, in Alabama, where a compensation for dower is made in money, the decree should not be for one-third of the net rents and profits, but for the annual interest on one-third of the value of the premises. See *Beaver v. Smith*, in note.

The difficulty in fixing with certainty the share of the income of an estate to be received by the widow annually during her natural life, is fully described by Ruffin, C. J., of North Carolina, in *Atkins v. Kron*.*

A Gross Sum in Lieu of Dower.—In the cases where the widow is dowable of a surplus, where lands, sometimes sold for partition, and sale of real estate to pay debts of deceased persons, it will often happen that the widow is called upon to accept an equivalent portion of the purchase-money in satisfaction of dower. And sometimes a gross sum is accepted by her in lieu of dower in rents and profits. It frequently occurs that the owner of the inheritance agrees to pay a certain sum in lieu of dower, and refers to the court as to the principles upon which her proportion shall be ascertained, which involves considerations of no small difficulty. And this is based upon certain mathematical rules, together with the doctrine of chances, as applied to the duration of human life, and it being quite beyond the purview of this work to enter upon that abstruse question, the student is referred to the 24th chapter of 2 Scribner on Dower, for full reference to the authorities and the tables of mortality.

Remedy at Common Law, and in Equity Courts to Recover Dower.—The legal remedy at common law is by writ of dower, *unde nihil habet*, or by a writ of right of dower, brought against the tenant of the freehold, and upon which, if the tenant obtain judgment, dower is assigned by the sheriff on the land, and the widow then proceeds to recover possession by ejectment. The process in these actions is still retained in England, and not abolished by the Dower Act 3 and 4 Will IV., ch. 27, § 36.†

It is not intended to detail the practice and rules of procedure in these common-law actions, as most of the United States have conferred the jurisdiction on a certain class of courts, most usually probate courts, and have prescribed the pleadings, procedure, etc.

* *Atkins v. Kron*, 8 Ire. Eq., 1.

† 1 Roper, H. & W., 429; 2 Scribner, ch. 5.

But the mere mention of the common-law remedies and the remedies in equity will indicate the great change made in this country in regard to the recovery of dower. It is true that in some of the States the common-law procedure of *unde nihil habet* is substantially retained. Such, perhaps, is the case in Massachusetts, Virginia, Maine, New Jersey, Delaware, New Hampshire, Rhode Island and Pennsylvania. Indeed, the statutes are so numerous and variant in the different States, that as to the action, the jurisdiction, and procedure, recourse must be had to each particular State for the guide of the lawyer.

It was decided very early by the Supreme Court of the United States, that courts of chancery have concurrent jurisdiction with courts of law in cases of dower.*

The jurisdiction of a court of equity in proceedings to obtain dower, is well established in several of the States of the Union.† One great advantage in the court of equity, is that the widow is enabled to bring before the court all parties interested in the subject-matter of her claim for dower, and to have the conflicting interests completely settled.

When the land has been aliened by the husband in his lifetime, it is not necessary to make the heirs of the husband a party. But if the husband had aliened several different tracts of land to different parties, the widow must present a petition against each separate holder; though the rule may be different in some of the States. Where the vendee of the husband has neglected to pay the balance of the purchase-money, the widow of the vendor may join with the heirs in a bill for rescission of the contract, and the assignment of dower. In those States where the widow is dowerable by statute only with what the husband owned at his *death*, there are but few controversies against the vendee of the husband, as he can alien without the wife's consent. Questions might arise as to fraudulent efforts to defeat dower.

* *Herbert v. Wren*, 7 Cranch, 370; 3 Mason, 347, 459; see also to same point, *Hazen v. Thurber*, 4 John. Ch., 604; *Badgely v. Bruce*, 4 Paige, 98; same in England, see *Munday v. Munday*, 2 Vesey, Jr., 122; 4 Kent, 71.

† 11 Gratt., 441; 12 Gill. & J., 388; *Wall v. Hill*, 7 Dana, 175; 5 Rich Eq., 254; 2 Jones (N. C.) Eq., 357; 35 Ala., 528; 5 Mo., 183; 28 Miss., 212; 7 Florida, 77; Tenn. Code; 4 Horning (Del.), 507; Ohio Laws; 6 Clark (Iowa), 106; 17 Ill., 92; 10 Ind., 305.

In a court of equity where the title is disputed, and a jury is necessary in the absence of statutory regulations, and where the equity and law courts are separate, the chancellor can retain the suit for a reasonable time, until the right of dower is established in a court of law.*

In England, before the statute of 3 and 4 Will IV., ch. 105, the widow, was not dowerable of the *equitable* estate, and although courts of equity exercised concurrent jurisdiction in dower, they could not any more than a court of law allow dower, except where the *legal* title thereto was established.

But as a different rule prevailed in most of the United States, and where courts of law and equity are not blended, the court of equity had *exclusive* jurisdiction of dower, when it attached to *equitable* estates.†

In the American courts the doctrine appears settled, that the plea of *bona fide* purchaser for value is no defence to a *legal* claim of dower, even in a court of equity. But if the title set up by the widow is an equitable one, it seems clear that the court should forbear to give its assistance in setting up such equitable title against another, set up by a fair purchaser who has obtained the *legal* title.‡ If it be a contest between two equities which are equal, the first in time usually prevails.

On this point Judge Story says: "Generally speaking, in America, fewer cases occur in regard to dower in which the aid of a court of equity is wanted than in England, from the greater simplicity of our titles, and the rareness of family settlements, and the general distribution of property among all the descendants in equal or nearly equal proportions. Still, however, cases occur in which a resort to equity is found highly convenient, and sometimes indispensable. Thus, for instance, if the lands of which dower is sought are undivided, the husband being a tenant in common, and a partition, or an account, or a discovery, is necessary, the remedy in equity is peculiarly appropriate and easy.

* *Badgley v. Bruce*, 4 Paige, 98; *Walls v. Beall*, 2 Gill & J., 468; *London v. London*, 1 Hump., 1 (in this case the matter was submitted to the jury by the Chancellor); 2 Scribner, *Dow.*, ch. 7, §§ 23-25.

† *McMahan v. Kimball*, 3 Blackf., 1.

‡ 16 Ga., 190; 9 Mo., 239; 10 Ohio, 498; 2 Jones (N. C.) Eq., 357; 4 G. Greene (Iowa), 453; 2 Scribner, ch. 7, § 38, note.

So, where the lands are in the hands of various purchasers, or their relative values are not easily ascertained, as for instance, if they have become the site of flourishing manufacturing establishments, or if the right is affected with numerous or conflicting equities, in such cases the jurisdiction of the court of equity is, perhaps, the only adequate remedy.”*

In assigning dower by metes and bounds, or in the rents and profits where the property is incapable of division, courts of equity adhere to the rules observed in such cases in a court of law, both courts in this respect being governed by the same general principles. With respect to costs, courts of equity usually decree according to what appears just and right. In courts of law (and perhaps some instances equity) costs are a creature of statute.

Summary Proceedings for Dower.—Mr. Scribner, in his work on Dower, chapter eight of the second volume, shows that twenty-seven of the States have summary statutory remedies to recover dower, and he refers to the statutes and modes of procedure and adjudication in these several States, growing out of these statutes. Some changes have been made, of course, since then, for at that writing North Carolina allowed petition for dower filed in the county and superior courts, but the Constitution of 1868 abolished the county courts, and the clerk of the Superior Court now has jurisdiction of dower.

In some of these States the widow can apply either verbally or in writing to the courts.†

Although these statutes give a more direct and summary remedy than the writ of dower at common law, it has been held that these statutes do not deprive the courts of equity of their jurisdiction over the subject, but, on the contrary the intention was to furnish a cumulative remedy, and the widow has an election to proceed in either mode.‡

* Story Eq. Jur., 632; see New Jersey Cases, *Chiswell v. Morris*, 1 McCarter, 101; *Eldridge v. Eldridge*, Ibid., 195; 3 Mason, 347; 5 John. Ch. R., 482; 4 Paige Ch. R., 98.

† Statute of Tenn.

‡ *Campbell v. Murphy*, 2 Jones (N. C.) Eq., 357. The Const. of N. C., 1868, abolished the county courts, and other courts, and substituted the “Superior Court.” The clerk of this Superior Court, by a statute, has jurisdiction of dower: Const. 1868; Battle’s Revisal, ch. 117, § 9.

But, supposing the appropriate tribunal is selected by the applicant for dower, we will proceed to notice some questions which may arise, and rules of evidence and practice which may be resorted to in a *controversy* regarding dower, in either one or any of these courts.

Evidence Necessary to Sustain a Claim for Dower.—The following must appear, if denied by the heirs or other persons sued :

1. Her marriage. 2. (Where the common-law right prevails) the *seisin* of the husband during *coverture*, either in *law* or *equity* (where the statutes allow dower of equitable estates). 3. Death of her husband. 4. (In States where the statute provides for dower of lands owned at the *death*) the widow must show that her husband was the owner of such lands, and in such way, either legal or equitable, as the law gives dower in.

1. As to proof of marriage. Direct proof by persons present at the marriage, or the register of the marriage, or the license, with proof of the performance of the rites by a person legally authorized, is, of course, the best evidence.

But notwithstanding this evidence may be in existence, in dower cases marriage may be proved by reputation, and declarations, and may also be presumed from circumstances. Reputation may be proved by the testimony of living witnesses, speaking to the existence of that reputation; the declarations of the parties, or their relatives if deceased, and by the conduct of the parties, and of third persons towards them. Declarations of the husband made during the time of cohabitation as husband and wife, in affirmation of the marriage, are competent. Letters of the parties addressed to each other as husband and wife, and the will of the deceased husband designating her as wife, are evidence.

But declarations of marriage cannot be given in evidence unless by the parties themselves, or by members of the family. The declarations of a deceased clergyman that he had celebrated the rites, are not admissible, neither the declarations of strangers in blood or affinity to the parties.* The declarations of deceased members of the family are only competent when made *ante litem mortem*.

It has been held, however, that a certificate of marriage by the

* 2 Scribner, Dower, ch. 9; 2 Greenl. Ev., § 461; see full notes to authorities in Scribner, vol. ii., ch. 9.

clergyman or other person in whose presence the marriage was celebrated, is not, of itself, evidence of the statements contained therein, unless it be proved as an examined copy of the register.* If the fact of marriage is proved, however performed, the presumption is that it was according to the law of the place. The rule applies—*omnia præsumuntur rite et solenniter esse acta*. And even if it be shown that a particular marriage was void, yet if the parties continue to cohabit as man and wife a subsequent legal marriage may be presumed.† A marriage solemnized according to law is complete without cohabitation. The subsequent refusal of the wife to live and cohabit with her husband does not affect her right to dower.‡ Sometimes, in consequence of liens and charges alleged superior to the dower right, it is necessary to show the time of the marriage. No doubt the first facts which occur indicative of marriage will supply an inference of the time when the marriage state began.

“With this view evidence was given in the Berkeley Peerage case as to the time when the Countess was first called Lady Berkeley by the servants, and when her linen was first marked with the initials M. B. and coronet.”§

Title in the Husband, either Legal or Equitable—Parties.—In cases where dower exists only as to lands of which the husband died seised and possessed, it would seldom occur that the title to the land is in dispute between the widow and heir; but other parties might intervene for the purpose of contesting the title.|| In the case of *Carney v. Whitehurst*, the widow made application for dower, and the heirs alone were made parties; but Whitehurst, who claimed the land by a purchase from the deceased husband during his lifetime, was allowed to be made a party defendant.

The court says: “Questions of practice merely, in the absence of a positive rule, established either by statute or rule, or decision of the court, must be decided on considerations of general convenience. In this case, however, there existed a positive law

* *Gaines v. Relf*, 12 How. (U. S.), 472; 2 Phillips Ev., 4th ed., 252, note, 324; *Blackburn v. Crawford*, 3 Wall. (U. S.), Rep., 175.

† 2 Scribner, ch. 9; Phillips Ev., 631; *Fenton v. Reed*, 4 John., 52; 18 John., 346; *Yeates v. Houston*, 3 Texas, 433; *Wood v. Wood*, 2 Bay., 476; *Chapman v. Cooper*, 5 Rich. L., 452.

‡ *Porter v. Barclay*, 15 Ala., 439; *Clayton v. Wardell*, 4 Comst., 230.

§ 2 Scribner, Dow., ch. 9, § 16. || *Carney v. Whitehurst*, 64 N. C., 426.

which settles the question without argument. Sec. 41, ch. 93, Acts 1868-69, enacts that, in proceedings to recover dower, "the heirs, devisees, and other persons in possession of, or claiming estates in the land, shall be parties." So in *Moore, ex parte*,* a creditor of the deceased husband was allowed to come in and be made a party to contest the admeasurement of dower. In this case, the application of the creditor was made *after* the judgment for dower. The court refused to express the opinion as to the creditor's right to appear and be made a party, in order to oppose the judgment, *before* the judgment for dower was had.

But, as to contesting the admeasurement of dower, they refer to *Stiner v. Cawthorne*,† in which the court said: "The Act of 1784 has not indicated the remedy for illegal or excessive allotment of dower, but the usages of our courts have defined it, to wit: that, when the report of the jury is returned, exceptions may be thereunto taken by any one aggrieved, and the court will set aside the allotment and order a new allotment, if sufficient cause be shown. Is a creditor 'one aggrieved' by an excessive allotment, or must the phrase be confined to those who are necessary parties to the suit, such as the heirs or devisees, and to such others as the petitioner may choose to make parties?" They conclude that it was proper for the creditor to come in and be made a party. The court held this was so under the old Act of 1784, and conclude that the same practice should prevail under the present law of 1868, which is recognized as special proceedings.

The North Carolina code, sec. 61, declares who *may* be made defendants to an action, and mentions, among them, "any person who has an interest in the controversy adverse to the plaintiff." All persons who might be made defendants have a right, upon their application, to be made parties, and assert their claims. This is the same rule applicable to an action to recover land under the code.‡

But, in *Lowery v. Lowery*,§ the widow filed her petition against

* *Moore, ex parte*, 64 N. C., 90.

† *Stiner v. Cawthorne*, 4 Dev. & Bat., 501.

The creditors are supposed to be represented by the heirs, and the creditors ought to be parties, especially when the estate is insolvent: *Ramsour v. Ramsour*, 63 N. C., 231.

‡ *Isler v. Foy*, 66 N. C., 547.

§ *Lowery v. Lowery*, 64 N. C., 110.

the children of Allen Lowery, praying for dower. Judgment was rendered, and a writ of dower was issued to the sheriff. At the term when the sheriff's return was made, Goin and wife, Elizabeth, filed a plea, claiming that she was the heir of the deceased, and denying the marriage between the petitioner and deceased. At the next term a jury found that the petitioner was not married to deceased. Judgment accordingly, and the petitioner appealed. In the Superior Court the petitioner moved for a confirmation of the report; this the judge refused, and directed an issue, whether Elizabeth Goin is the heir of deceased, from which judgment the petitioner appealed to the Supreme Court. It was held that the appeal by Goin did not carry up the judgment for dower; and that the application was in the nature of a motion at one term to set aside a judgment at a former term, which could not be done, being a regular judgment. The court says: "That, as in a writ of dower at common law, the suit for dower is at an end by the judgment awarding dower." "Any proceedings to set aside the inquisition is in the nature of a new suit." It is indicated, if Goin had applied *before* the judgment for dower, she would have been properly admitted as a party; certainly now, under the Code of 1868. But, as to Elizabeth Goin, the judgment is *res inter alios*, and she is not affected by it.

Then, again, as to *parties*. In *Avery, ex parte*,* it was held that, where the lands were devised to the widow, and the estate was insolvent, and the land being required by the executor to pay debts, she was remitted to her right of dower; and that, in the petition, she should not join in with the heirs, but they should be made party *defendants*, and a guardian *ad litem* appointed, and that the creditors had a right to become party defendants. This was under the code practice, Acts of 1868–69.

But, upon the question of title, the widow is not required to make strict proof of title under the issue of *non-seisin*, as she is

* *Avery, ex parte*, 84 N. C., 113.

A widow, who takes land as a devisee under the will of her husband, is remitted to her right of dower when it becomes necessary to resort to the lands devised to pay the debts of her husband. In accord, *Mitchener v. Atkinson*, Phillips Eq., 23; *Gully v. Holloway*, 63 N. C., 84. And, when allotted, is not subject to the payment of debts during her life.

not the custodian of her husband's title-papers; hence a *prima facie* case is sufficient.

If the "defendant is in possession under a conveyance from the husband, or by virtue of title derived through mesne conveyances from him, proof of this fact is sufficient to establish as against the defendant, seisin in the husband."*

If the estate in which dower is demanded has come to the husband by descent, it will be necessary, to entitle the widow to dower, to prove the seisin of the ancestor, his death, and the heirship of the husband. And, with the qualifications here stated, we suppose title may be shown in a suit for dower in the same way that title to real property may be shown between all other contestants over title.

Proof of Death of the Husband.—It will occasionally occur, owing to peculiar facts and circumstances, the party sued for dower will deny the death of the alleged husband.

The party alleging the death takes the *onus* of the proof, for the existence of a party being once shown, he is presumed to continue in life until the contrary appears. Of course, the best evidence is from those who were present when the death occurred, or who saw the body after life was extinct. Documentary evidence is often resorted to; thus, *Lewis v. Marshall*† holds the register of burials of Christ Church, St. Peter's and St. James's, Philadelphia, as evidence of the period of the death of the parties mentioned therein.

In some of the English temporal courts (though different in the ecclesiastical courts), neither letters of administration nor probate of will are even *prima facie* evidence of death. But, in the American courts, the tendency of opinion is to regard the letters of administration and proof of the will as *prima facie* evidence of death.‡ Family reputation and the declarations of deceased relatives, who had no motive to misrepresent the truth,

* 2 Scribner, Dow., ch. 9, § 20 (full note 6). In accord, *Jackson v. Waltermire*, 5 Cow., 299; *Bancroft v. White*, 1 Carnes, 190; *Embree v. Ellis*, 2 John., 123.

† *Lewis v. Marshall*, 5 Peters (U. S. Rep.), 470.

‡ 1 Greenl. Ev., § 41, 550; § 278, d, 355. In accord, *Newman v. Jenkins*, 10 Pick., 515; 27 Miss., 97.

are admissible evidence on this issue.* Many other facts and circumstances, not here mentioned, may be shown indicating death. *Presumption*, as well as direct evidence, is sometimes sufficient. A person absent from home, of whom no account can be given for a period of seven years, is presumed to be dead. Non-receipt of intelligence from the party for the entire period of seven years is necessary to raise this presumption. Circumstances may be adduced which will warrant the presumption of death in a shorter time than seven years; thus, where a person had embarked on board a vessel which had not been heard of for two or three years, and which was shown to have encountered, soon after sailing, strong gales and tempestuous weather, it was held that from these facts death might be presumed.† Other circumstances may be shown, such as proof of age, state of health, occupation, mode of life, to accelerate the formation of this presumption. For further discussion of this question, the student is referred to 2 Scribner on Dower, ch. 9.

Estoppel as to those Claiming under the Husband.—Mr. Scribner says: "In the American courts a number of cases have arisen, involving the question whether, in proceedings for dower, parties, claiming under the husband of the demandant, are estopped from denying his seisin, and the decisions are somewhat conflicting." But, in New York, the estoppel is held good.‡ In North Carolina, the doctrine of estoppel is applied against a party claiming under the husband.§ The same in South Carolina, Mississippi, Alabama, and Arkansas.|| In Alabama, it was held that when the defendant took nothing by the husband's deed, he is not estopped from showing the truth in answer to a claim of dower.¶ The holdings are so various in the different States, it is necessary to look to the general principles of estoppel.

* 2 Scribner, Dow., ch. 9, § 43; 3 Bibb., 235; *Dudley v. Grayson*, 6 Mon., 259; *Lessee of Scott v. Ratcliffe*, 5 Peter (U. S. Rep.), 81.

† *Watson v. King*, 1 Stark (N. P. C.), 121; 2 Eng. C. L., 322. As to the rule of presumption in case of dower, see *Rice v. Lumley*, 10 Ohio Stat., 596.

‡ *Bancroft v. White*, 1 Caines Rep., 185; *Hitchcock v. Harrington*, 6 John., 290 (Kent, J.).

§ *Norwood v. Morrow*, 4 Dev. and Bat. Law, 442; *Ibid.*, *Love v. Gates*, 364.

|| *Gayle v. Price*, 5 Rich. Law, 525; *Randolph v. Dorr*, 3 How. (Miss.), 205; *Edmonston v. Welsh*, 27 Ala., 578. As to general doctrine, see *Blackeney v. Ferguson*, 20 Ark., 547.

¶ *Edmondson v. Montague*, 14 Ala., 370.

The strict doctrine of estoppel between vendor and vendee has been questioned by high authority ; thus in the case of *Blight's Lessee v. Rochester*, the United States Supreme Court, Chief Justice Marshall, said :* "The doctrine of estoppel is traced back to feudal tenures, when the connection between landlord and tenant was much more intimate than it is at present, when the latter was bound to the former by ties not much less strict and not much less sacred than those of allegiance itself.

"The propriety of applying the doctrine between lessor and lessee, to vendor and vendee may well be doubted. The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor. The rights of the vendor are intended to be extinguished by the sale, and he has no continuing interest in the maintenance of his title, unless he should be called upon in consequence of some covenant of warranty in his deed. The property having become by the sale the property of the vendee, he has a right to fortify that title by the purchase of any other which may protect him in the quiet enjoyment of the premises. No principle of morality restrains him from doing this, nor is either the letter or spirit of the contract violated."†

The reasoning of Chief Justice Marshall is replete with force. Perhaps, the rule would be reasonably stated to say that, where the purchaser of the husband took the fee, and had not been disturbed by any conflicting title, he should be estopped from a denial of seisin in the husband ; but where the vendee of the husband gets no title, and has been compelled to purchase the title from the real owner in order to protect his quiet enjoyment, he should not be estopped from a denial of seisin of the husband. Such appeared to be the principle in the New York cases prior to the case of *Browne v. Potter*.‡ But, in that case, the tenant had been compelled to purchase in a superior title, in order to protect his possession, yet the court held that he could not hold this against a claim of dower from the widow of the first grantor.§

* *Blight's Lessee v. Rochester*, 7 Wheat., 535.

† *Rawle on Covenant for Title*, 2d ed., 280.

‡ *Browne v. Potter*, 17 Wend., 164.

§ In this holding, Mr. Scribner thinks the court went far beyond the holdings elsewhere, and cites *Dashiel v. Collier*, 4 J. J. Marsh., 601 ; *Hugley v. Gregg*, 4 Dana, 68 ; *Smith v. Ingalls*, 13 Me., 284, 287.

But in *Sparrow v. Kingman*,* Brownson, J., refused to indorse the case of *Browne v. Potter*, and said: "There is no principle upon which the estoppel can be carried another step, and applied to a case where the husband's grantee has been obliged to purchase in a good outstanding title for the purpose of protecting his possession." This case is said by Mr. Scribner to stand alone in the extreme doctrine there held. The North Carolina decision, in *Norwood v. Sparrow*,† is thought to approach more nearly this extreme view of estoppel; but a feature of that case has been overlooked, that the outstanding title was obtained pending the suit and after plea. The more reasonable view is taken, in the case of *Coakley v. Perry*,‡ by the court of Ohio. It was held that, "one may fortify an existing title without putting it in jeopardy, if the rights of others are not thereby prejudiced; and by so doing he cannot originate rights in others." This is putting the question clearly and forcibly.

So, the weight of authority will authorize the following proposition, and no further: "That where one enters into the possession of land under and by virtue of a conveyance in fee, with covenants of warranty from another, and retains that possession, relying upon the grant, or the possession under it, in aid of his title or possession, he cannot deny the title thus acquired, against the grantor and those claiming under him."§

Whether this conclusion is founded on a *legal estoppel* or the "moral policy of the law" as stated by Chief Justice Marshall, it is reasonable, and tends to the ends of justice rather than the doing a wrong. This rule will apply to conveyances without as well as with warranty.

Sometimes the husband makes a conveyance without real or substantial interest in the premises, when the title is not that of the husband, but a third person, as in cases of estates held in trust. For instance, a vendor of lands holds the title in trust for his vendee, and if he marry before a conveyance is made, his widow has no dower in the estate.

* *Sparrow v. Kingman*, 1 Comst., 242.

† *Norwood v. Sparrow*, 4 Dev. & Bat., L., 442; see 2 Scribner, Dow., ch. 10, § 27.

‡ *Coakley v. Perry*, 3 Ohio St., 344; see also *Thompson v. Thompson*, 19 Maine, 235; *Fox v. Widgery*, 4 Greenl., 214.

§ Opinion in *Ward v. McIntosh*, 12 Ohio St., 231.

"Where the grantee takes an estate conveyed in the execution of a trust, he cannot, consistent with principle and the dictates of justice, be precluded from showing the real facts of the case. He is not in possession under the husband, in the sense in which that expression is used, and therefore ought not to be subjected to the operation of the doctrine of estoppel."* Then again, the husband may have been seised of a beneficial interest in which dower could not attach, as in the case of a mortgagee; he may make a deed, but his widow is not entitled to dower.†

When the Widow is Estopped from having a Regular Assignment of Dower.—1. She is estopped in equity by the acceptance of a freehold interest in other lands, or of a term of years, or of a sum of money, or any other kind of collateral satisfaction.

2. She is barred if she agree to accept an interest in the dowerable estate which is inconsistent with her title to dower in that estate;—this acceptance will bar her legal right.

3. She is estopped by her covenants, as, if she execute a conveyance of her husband's lands with covenants of warranty, she cannot afterwards assert dower against parties claiming under such conveyance. Perhaps she could not set up dower in any after-acquired right to the same premises.

4. She may be estopped by the covenants of her ancestor.

5. She may be affected by the covenants of her second husband.

6. In some of the States the right of dower, whether inchoate or perfect, may be defeated by a valid sale for the payment of taxes.

7. If she accept a statutory provision in lieu of dower, she is estopped both in law and equity.

8. If she be guilty of fraudulent practices in inducing the purchaser to take the estate under the belief that she waives her dower, she will be estopped from afterward setting up a claim. Where she has done nothing to induce the action of the party in purchasing, her mere silence is not an estoppel, especially if the circumstances are such that she is not required in good faith to disclose her claim.‡

* 2 Scribner, Dower, ch. 10, § 29.

† Foster v. Dwinell, 49 Maine, 44; see the doctrine of estoppel, 2 Smith's Leading Cases, 6 Am. ed., 712, and Bigelow on Estoppel.

‡ See the points elaborated in 2 Scribner, Dow., ch. 11.

Says Judge Kent: "As a general principle, it may be observed that the wife's dower is liable to be defeated by every subsisting claim or incumbrance, in law or equity, existing before the inception of the title, and which defeats the husband's seisin."* The inchoate right being a mere contingency and not a part of the marriage contract, is wholly divested when the land is taken by a municipal corporation, upon payment of the value of the land to the owner, according to law.† The English statute of Westm. 2, 13 Edw. I., made the adultery of the wife, accompanied with elopement, a forfeiture of dower by way of penalty, but reconciliation with the husband would restore the right. But in New York the statute declared that "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." In another part of the New York statute, it is declared that if the wife be *convicted* of adultery, in a suit for divorce, brought by the husband, she forfeits the right to dower. A divorce *a vinculo matrimonii* bars the claim of dower, for to entitle the party claiming dower, she must have been the wife at the death of the husband; and this is so, whether the divorce be legislative or judicial. So the meaning of the word *misconduct* in the New York statute is not very clearly understood.‡ Almost all the States of the Union make adulterous elopement a good plea in bar of the right of dower.

The North Carolina Act of 1871-2 has the following comprehensive provision, section 14: "When a marriage shall be dissolved for any of the causes set forth in section 4 of this chapter, the party adjudged guilty of such cause shall thereby lose all his or her right to an estate by the curtesy, or dower, and all right to any year's provisions or distributive share in the personal property of the other, and all right to administer on the estate of the other, and every right and estate in the real or personal estate of the other party, which, by settlement before or after marriage, was settled upon such party in consideration of the marriage only." This penalty attaches on a divorce *a mensa et thoro*, in this State, as there are only two causes in the statute which au-

* 4 Kent, 50 (note 1).

† Moore v. Mayor of New York, 4 Seld., 110; in accord, 17 Penn. Stat., 449; 6 Ohio St., 547.

‡ 4 Kent. Com., 53 note (c), *ibid.*, 54.

thorize a divorce *a vinculo*, and the act allows a divorce *a mensa et thoro* for five different causes.*

Section 16, of this Act of 1871-2, makes the elopement of the wife with the adulterer, a forfeiture of dower. And the 17th section provides that, if the husband shall separate himself from the wife and live in adultery, he shall lose his curtesy and all other rights allowed by law in her estate; *provided*, the wife has commenced an action of divorce in her lifetime. The statutes of the several States have greatly changed the law of divorce; hence different consequences may result. In England no divorce *a vinculo* was granted by the courts for a cause arising *subsequent* to the marriage, therefore adultery was only a cause for a divorce *a mensa et thoro*. The divorce *a vinculo* was granted for causes which made the marriage void *ab initio*, such as prior marriage undetermined, idiocy, mental incapacity, etc. So, in the United States, the failure to observe statutory regulations will make the marriage void *ab initio*, as the prohibition of marriage between the white and black races.† By the statute of 5 and 6 Will. IV., ch. 54, all marriages solemnized after the 31st of August, 1835, within the prohibited degrees, either of affinity or consanguinity, are made absolutely void. But, under the English law, a divorce *a mensa et thoro* did not deprive the wife of dower, because in a decree of this kind the marriage contract is not annihilated. But, in a decree *a vinculo* (which was never for a cause subsequent to the marriage), in contemplation of law the relation of husband and wife never subsisted, the rights of property, as between themselves, are viewed as never having been operated upon by the marriage, and, of course, there could be no right of dower.

On this subject, Mr. Scribner‡ says: "In the American courts, however, the practice as to divorces is different. The statutes of nearly all the States, departing in this respect from the English law, provide for a dissolution of the marriage for matters arising subsequent to its solemnization; but decrees of divorce founded upon these statutes operate prospectively only, and do not avoid the marriage from the beginning. The marriage stands as a good

* Battle's Revisal, ch. 37; Acts of 1868-9, 1871-2.

† State v. Walters, 3 Iredell, 445; Dupre v. Boulard, 10 La. Ann., 411.

‡ 2 Scribner, Dower, ch. 19, § 5.

marriage from the time it was entered into down to the date of the decree of dissolution. Whether, to this condition of the parties, so different from that resulting from a divorce *a vinculo* in the English ecclesiastical courts, the same consequences as to dower attach, is a grave and important question." Parliamentary divorces are very analogous to divorces granted in this country, as they are granted for causes arising subsequent to the marriage. These parliamentary divorces, it seems, do not divest the dower of the wife, except the act expressly so provides.

It has been held, under the New York statutes, in regard to divorce, that if the wife obtains a divorce on account of adultery of the husband, she is not deprived of her dower, although she may marry again.* If the wife be the guilty party, she loses her right to dower under the statute, as in most, if not all of the other States. But the statutes of many of the States, as in North Carolina, settle this question by providing in terms that a decree for a divorce for adultery, and other causes, is a bar to the right of dower. And Mr. Bishop holds that "the common law of this country is clearly established, that no woman can have dower in her husband's lands, unless the coverture were continuing at the time of his death."†

In the District of Columbia, the court granting a divorce may allow the wife to retain her dower.‡

So much depends upon the statutes of the different States, which, being variant, we may expect to find a variety of judicial opinions and *dicta*.

Both in England and in the American States, the voluntary elopement and adultery of the wife is a bar to the right of dower.§

Devises in Lieu of Dower.—By the English statute of 3 and 4 Will. IV., ch. 105, which applies to widows who have been married since 1834, the wife's dower will be defeated by a devise of

* *Day v. West*, 2 Edw. Ch., 592; *Burr v. Burr*, 10 Paige, 20, 25; *Reynolds v. Reynolds*, 24 Wend., 193; *Cooper v. Whitney*, 3 Hill, 99; *Wait v. Wait*, 4 Barb., 192; *Ibid.*, 4 Comst., 95; *Forest v. Forest*, 6 Duer, 102, 152, 153.

† *Bishop, Marriage and Divorce*, 3d ed., § 661; 4 Kent, 54; *Scribner, Dower*, ch. 19, and notes.

‡ 12 U. S. Stat. at Large, p. 60, § 9.

§ 2 *Scribner, Dower*, ch. 18.

lands, or any estate or interest therein, unless a contrary opinion shall be declared by the will.*

Several, if not all the States, have statutes making a devise in lieu of dower competent, unless she dissent from the will in the mode and within the time fixed by the statute. So the practitioner must look first to the law of his own State on this point.

On the general idea, Mr. Scribner says: "It has been observed that in general a widow's right to dower cannot be barred at law by a collateral satisfaction, except in cases where the provision comes strictly within the operation of the Statute of Jointures. The courts of equity, however, have extended the legal rule, and, in instances of testamentary provision by the husband for his widow, it is the practice of those courts to consider them in the nature of *equitable* jointures, although not conforming to the strict requisites of the act, whenever it appears that they were intended to be in lieu of dower. In cases of this nature, the widow may be compelled to elect between the provisions made for her in the will and her dower under the law." The dower is a legal right, and to deprive the widow of the same by a voluntary gift, it must clearly appear that the testator intended the provision in lieu of dower, as if the provision is inconsistent with the right to have one-third of the lands set apart by metes and bounds.† In cases where the widow is required to elect between her dower and the benefits under the will, she is entitled to have the respective values of the two interests ascertained before she elects between them, and she may sue in equity for the ascertainment of those interests. Election cannot be satisfactorily made between two estates until the value of each is actually known.

Election by Widow.—This subject depends so much upon the different statutes of the several States, that it is only important to notice a few general principles, which might apply to all. The time in which the widow is allowed to elect between taking dower or the provisions of the will is fixed variously from thirty

* See appendix to 1 Scribner on Dower.

For a full discussion of the doctrine of devises in lieu of dower, consult 2 Scribner on Dower, ch. 16.

† *Sandford v. Jackson*, 10 Paige, 266; *Gordon v. Stevens*, 2 Hill (S. C.), ch. 46; *Cunningham v. Shannon*, 4 Rich. Eq., 135; *Tooke v. Hordeman*, 7 Ga., 20; 24 Ga., 185; *Lord v. Lord*, 23 Conn., 327; *Clark v. Griffith*, 4 Iowa, 405; *Dixon v. McCue*, 14 Gratt., 540; 7 Cranch, 370; 8 Gratt., 83.

days to twelve months by the different States.* It might be said that,

1st. She has a right to be informed of the value of the two estates.

2d. In the absence of a statute, the widow cannot elect by attorney; it is a personal privilege.

3d. If the widow be an infant, the court of equity may elect for the benefit of an infant between inconsistent rights.

4th. The election must be made within the time prescribed by law.

5th. The statutes generally require the election to be *express*, but there may be an implied election, as, for instance, the taking possession of property under the will, and exercising unequivocal acts of ownership.

6th. The widow is not concluded by an election made under a mistake of the facts, and of the condition of the estate.

7th. An election induced by fraud is not binding.†

The Widow's Remedy in this Matter.—It is but reason and common sense to say that if the widow is deprived of the provisions under the will, she is entitled to her primitive right of dower. It is not necessary that the deprivation should be total; it is sufficient if it be a substantial part.

The provisions made for her in the will might be lost: 1st. By taking the property devised for the payment of debts. 2d. She might be evicted by a title paramount, without any fault of hers. 3d. If nothing passes by the devise.‡ In either of these events she has the right to sue for dower in such mode and manner as may be prescribed in the locality where she may live, and may, in certain instances, invoke the general powers of a court of equity.

* See 2 Scribner, Dow., ch. 17, in which a reference is made to all these statutes and the adjudications on the same.

† 2 Scribner, Dow., ch. 17. In North Carolina, the statute authorizes the widow to dissent in person, or by attorney, and, if she be an infant or insane, by her guardian: Battle's Revisal, ch. 117, sec. 6, and this must be done within six months. See statutes of other States.

‡ Upon these points, see the following cases: Thompson v. McGaw, 1 Met., 66; Hastings v. Clifford, 32 Me., 132; Thompson v. Egbert (N. J.), 2 Harris, 459; Chew v. Farmers' Bank, 9 Gill (Md.), 361; Stevens v. Terrell, 3 Mon., 133; see Code of Tenn., 2404 (1858); Hone v. Van Schaick, 7 Paige, 221; affirmed in 20 Wend., 564.

Jointure, a Bar to Dower.—A *jointure*, says Bouvier, is “a competent livelihood of freehold for the wife, of lands and tenements, to take effect in profit or possession, presently after the death of the husband, for the life of the wife at least.” Jointures are regulated by the statute of 27 Hen. VIII., ch. 10, commonly called the statute of uses. In a more enlarged sense, jointure signifies a joint estate, limited to both husband and wife.*

Mr. Bouvier further says: “To make a good jointure, the following circumstances must concur, namely:

“1. It must take effect, in possession or profit, immediately from the death of the husband. 2. It must be for the wife’s life, or for some greater estate. 3. It must be limited to the wife herself, and not to any other person in trust for her. 4. It must be made in satisfaction for the wife’s whole dower, and not of part of it only. 5. The estate limited to the wife, must be expressed or averred to be in satisfaction of her whole dower. 6. It must be made before marriage.” If the jointure is made after marriage, it does not bind the wife, unless she accepts it. Lord Coke has said there are other modes of limiting an estate to the wife, which would be a good jointure under the statute, if accepted by the wife. Under the statute of Henry VIII., a jointure made before marriage is binding on the wife, without her assent. The provisions of the 27 Henry VIII., ch. 10, relating to jointure, have been substantially adopted in a large number of the States; but, in many of these same States, the distinction between legal and equitable jointure has been abolished. And, in some of the States, a jointure by conveyance to another in trust for the wife, is made valid. This provision by way of jointure must be in full satisfaction of dower, and must appear from the deed itself as a general rule. Some of the authorities held that the failure to express in the deed that it was in full satisfaction of dower might be supplied by parol testimony; but others, including Mr. Roper, think that, since the statute of frauds, parol evidence is inadmissible. Mr. Cruise, however, thinks such an averment may be made since the statute.† The statute of Henry VIII.

* 2 Black. Com., 137; 1 Bouvier Law Dic., 674; 4 Kent., 53.

† 1 Greenl. Cruise, 191, §§ 17–20. See, also, *Finch v. Finch*, 10 Ohio Stat., 501. See, also, an early Va. case of *Ambler v. Norton*, 4 Hen. and M., 23;

as does that of several of the States, reserves to the widow the right of election, if the jointure is made after the marriage. Should she enter upon the lands so settled, and receive the rents and profits, this will be a confirmation of the jointure, and a bar to dower.

The letter of the statute is confined to jointures made by the husband; but its provisions have been liberally construed to apply to a jointure settled by the father of the husband, or through the medium of trustees.

In the United States, under the principles of the jointure, as administered, especially in a court of equity, a large number of settlements and agreements with the wife, and for her benefit, both before and after marriage, will be held as a bar to dower.

Thus, in *Conly v. Lawson*,* the parties made an agreement before marriage, and in contemplation of the same, that neither, after the death of one of them, should claim anything that had belonged to the other before marriage, was held sufficient to exclude the woman from dower, year's provision, and distributive share of the husband's personal estate.

This same doctrine is held in other States.†

Courts of equity would not allow a woman to hold against conscience; therefore, if the provision in her favor be subject to some strict *legal* defects, she will be compelled in equity to elect. Then, again, a court of equity will frequently enforce the specific performance of the agreement of the parties when for the interest of the wife, and when against conscience for her to hold an estate. If the widow, having a legal jointure, is evicted of the whole, or part of it, by a superior title, she is remitted to her right of dower *pro tanto*. If the jointure is equitable, it is thought the consequences of eviction will be the same as if it were legal. It has been held that, if the jointure be by an ante-nuptial contract, and the woman had expressly agreed to relinquish her dower, and she

but *contra*, *Swaine v. Perrine*, 5 John. Ch., 482; *Perry v. Perryman*, 19 Mo., 469; *Worseley v. Worseley*, 16 B. Mon., 455; 49 Me., 460; *Liles v. Flemming*, 1 Dev. (N. C.) Eq., 185.

* *Conly v. Lawson*, 6 Jones (N. C.) Eq., 132.

† *Gelzer v. Gelzer*, 1 Bailey's Eq., 387; *Logan v. Phillips*, 18 Mo., 22. As to such contracts as will not bar dower, see *Whitehead v. Middleton*, 2 How. (Miss.), 692; *Faulkner v. Faulkner*, 3 Leigh, 255; 13 La. Ann., 613; *Cunningham v. Shannon*, 4 Rich. Eq., 135.

is afterwards evicted, that, although her right to dower is revived at law, yet she is in equity precluded from claiming dower against a purchaser of other lands of the husband not charged with the jointure.* The statutes which authorize the wife to convey any interest in land will enable her to convey her jointure. And, of course, having accepted the jointure, and then conveyed it, she is not entitled to dower on the death of her husband. The effect may be different if the jointure conveyed was made subsequent to the marriage.†

The Wife may Release Dower.—A release cannot be by parol, because it is an interest in lands under the statute of frauds.

It was doubted in England for a time whether, before the death of the husband, the wife could in any mode extinguish her inchoate title to dower; yet in time, it being an interest in land, which attached from the instant of concurrence of marriage and seisin, it was held that she could release this inchoate right of dower in the same mode she could relinquish any other legal interest in real estate. She could, therefore, release by fine.

And an action brought against husband and wife for the recovery of lands wherein the wife had an estate, and judgment was given against them, the wife was barred.‡ The wife was, therefore, barred of dower by a fine or judgment in an adversary suit.

Fines and recoveries have been abolished in England by 3 and 4 Will. IV., ch. 74, and a deed is substituted in their stead. And the late Dower Act of 3 and 4 Will. IV., ch. 105, has, as to marriages contracted since January 1st, 1834, placed the right of dower entirely under the control of the husband; that is to say, the common-law dower is abolished, as in many of the States, and the wife gets dower only in lands owned at the death of the husband. Fines have never been in use in many of the States.

The Husband and Wife must Join in the Deed.—Under the chapter in regard to the wife's separate estate, the mode and requirements of the wife's joining in the deed have been somewhat discussed.

It is said that in many of the States a release or conveyance executed during coverture by the wife, in which the husband

* Simpson v. Gutteridge, 1 Madd., 609; 2 Scribner, ch. 15, §§ 85, 87.

† 2 Scrib. Dow., ch. 15, § 90.

‡ 2 Inst., 342; 2 Scribner, ch. 12, § 3.

does not join, is as a general rule ineffectual to bar her dower.* But this may depend very much on the statutes of the several States. It has been held good for the wife to make a separate deed, subsequent to her husband's sale, in which the sale is recited as a consideration on which she relinquishes dower. These statutes generally provide that husband and wife shall unite in the execution of a deed to divest the wife of her estate.

The release must be under seal, except in the States, like Kentucky, Alabama, and Iowa, which provide by statute that any estate in land may be conveyed by an instrument not under seal.†

The Deed must contain Words of Release or Grant.—It is not alone sufficient that the wife should join with her husband in the execution of the deed, but it must contain words constituting a release or a grant of her interest. Says Judge Story: "The deed must contain apt words to make her a grantor, otherwise the deed conveys only the right of the husband."‡ And this is aptly done by introducing her in the close of the deed as expressly relinquishing all claims of dower in the premises sold. The mere signing and sealing of the deed by the wife is not sufficient to divest her right;§ neither the insertion of her name in the introductory clause, describing the parties, nor in the concluding part of the deed. So, if she express that she joins "in token of her assent thereto," or "in token of her free consent," it is not sufficient. "If the deed do not contain words proper to pass or extinguish the interest of the wife, the omission cannot be aided by the certificate of acknowledgment."||

This idea is well stated in a Pennsylvania case.¶ In speaking

* *Fowler v. Shearer*, 7 Mass., 14; *Powell v. Monson & Man. Co.*, 3 Mason, 347.

† 2 Scribner, ch. 12, § 26, notes.

‡ 4 Kent Com., 59; 1 Washb. Real Prop., 2d ed., 200.

§ *Catlin v. Moore*, 9 Mass., 218; 13 Mass., 223; *Hall v. Savage*, 4 Mason, 273; *Cox v. Wells*, 7 Blackf., 410; *Davis v. Bartholomew*, 3 Ind., 485; 7 Ohio, 194; 51 Maine, 367.

|| 2 Scribner, Dower, ch. 12, § 28; see the doctrine discussed in *Leavitt v. Lamprey*, 13 Pick., 382; *Davis v. Bartholomew*, 3 Ind., 485; *Conover v. Porter*, 14 Ohio Stat., 450; *Drury v. Foster*, 2 Wallace (U. S.) R., 24.

¶ *Leonard v. Cutler*, 18 Pick., 9; *Smith v. Handy*, 16 Ohio, 191.

of what words are necessary to bar the dower, the court says: "She must not only join with her husband in a deed of conveyance of the land, by executing the deed, the conveyance being made by him, but the deed must contain apt words of grant or release on her part; and if it does it will bar her right of dower, although she had no vested title in the land at the time of the conveyance, and no title passed from her to the grantee. The grant or release of the wife operates by way of estoppel or extinguishment of her right, so as to bar any future claim of dower which may accrue to her after the death of her husband."

The usual form is for the wife simply to relinquish or release her right of dower, but words of grant are equally efficacious and proper to bar her right, for, in neither case does her deed pass any title to the estate.

So it is not necessary that she should release or grant her right of dower *eo nomine*, any other words showing an intention on her part to relinquish her dower will be sufficient. And if she join her husband in the sale, and undertakes to convey the land jointly with him, this would generally be a sufficient indication of her intention to exclude herself from any claim of dower.

"By joining in the words of grant she must be understood to give or intend to give all the right and title she was capable of giving, whether by way of passing an estate, or extinguishing or barring a right depending on a contingency."*

Some of the States have special statutes in regard to what kind of conveyance will pass the dower right. Some of these statutes make the release of dower by a minor *feme covert* valid, as, for instance, Alabama† and Maine.‡ According to the weight of authority, a release of an infant *feme covert* is wholly ineffectual to pass dower, some of the authorities holding that no act of disaffirmance is necessary before bringing suit.§

It need only be stated that if the wife be insane she is incompetent to release dower; neither has the guardian of a lunatic wife authority to release dower. The wife can only be deprived of dower by her voluntary act. The States of Massachusetts,

* 2 Scribner on Dower, ch. 12, § 29.

† Clay's Dig., p. 174, § 9.

‡ Act of 1863, ch. 215; Adams v. Palmer, 51 Maine, 480.

§ 1 Wash. Real Prop., 2d ed., 200; Ibid., 582; 2 Kent, 236; 2 Scrib. Dower, ch. 12, § 31, notes.

Ohio, Missouri, Iowa, Virginia, Wisconsin, and perhaps others, have statutes providing a mode of disincumbering the estate of the contingent dower interest when the wife is *non compos mentis*.

The wife may recall her assent before the deed is delivered; as to what amounts to delivery will not now be discussed. If the wife release dower for a particular purpose, its operation will be restricted to that purpose; as, in the case of joining in a mortgage, she is entitled to dower subject to the right of the mortgagee. If she submits to any incumbrance, it is not necessarily an absolute bar to dower, but is a release to the extent and for the purposes of the contract, whatever it may be. A *release* may be presumed against a widow, when properly pleaded, where she has failed to claim dower for twenty years or more.*

Release to Husband.—At common law the wife cannot relinquish dower to her husband, because of their disability to contract with each other. The only mode being a conveyance to a third person, in which she joined with the husband. And in New York it was held that a court of equity, by virtue of its equity jurisdiction, had no authority in a divorce suit to compel a married woman to accept a gross sum in lieu of dower.† But in *Burdick v. Briggs*,‡ the court of Wisconsin intimated that a wife suing for divorce may stipulate with her husband that she will release dower in his lands, and that a decree founded upon such agreement would be binding.

Now, while the authorities all agree that (notwithstanding the common-law disability) the courts of equity will uphold the contracts between husband and wife in many instances, why should it not apply to the release of dower, if for a consideration just and adequate, and untainted by fraud? A voluntary gift or grant by the husband to the wife, when it amounts to a reasonable provision for her, will be sustained in a court of equity;§ why should not a release of dower be sustained, if clearly for the

* *Spencer v. Weston*, 1 Dev. & Bat. Law, 213; *McMillan v. Turner*, 7 Jones (N. C.) Law, 435; *Barnard v. Edwards*, 4 N. H., 321; *Evans v. Evans*, 3 Yeates, 507.

† *Crain v. Cavana*, 36 Barb., 410.

‡ *Burdick v. Briggs*, 11 Wis., 126; see 7 Iowa, 46.

§ 2 Story Eq. Jr., § 1375.

advantage of the wife? The release of dower may be the consideration for a more ample provision on the part of the husband. She might release dower in one tract of land in consideration for a conveyance of the fee in another tract, and it would seem that if a court of equity could sustain the deed to the wife when made voluntarily, it could for a stronger reason, uphold the deed when founded on the consideration of her release of dower. If *her* money was the consideration for the deed, of course a court of equity would uphold the conveyance in some way, either as an estoppel on the grantor, or by holding him as trustee for the wife.

But it has been a controverted question as to the effect of certain married women's acts upon the power of the wife to release dower to the husband.

This question arose under the New York Act of 1849, in the case of *Graham v. Van Wyck*,* but the court held that the act did not authorize the wife to release dower directly to her husband.

Under the code of Iowa, it has been held, in the case of *Blake v. Blake*,† that the wife may convey her lands, or release her dower directly to the husband. The court says the code gives the wife "full power to convey her interest in real estate in the same manner as other persons," and therefore concludes that a conveyance or release of inchoate dower, if founded on adequate consideration, and without fraud or undue influence, is binding and effectual. This question, and others of a kindred kind, growing out of the numerous married women's acts, is likely to have a more complete elaboration in cases yet to arise. The language of the different acts is quite variant, which may be the chief reason for a diversity of judicial determination. It may be that the court of equity, with its efficient power, will place such a construction upon these statutes as will best subserve the ends of justice, and at the same time protect the *feme covert* from all fraud and undue advantage.

* *Graham v. Van Wyck*, 14 Barb., 531 (in the year 1851); in accord, *White v. Wager*, 25 N. Y., 328; *Winans v. Peebles*, 32 N. Y., 423; see the Pennsylvania decisions to the same effect, upon a very similar statute: *Bear v. Bear*, 33 Penn. Stat., 525; *Hough v. Jones*, 32 Penn. St., 432; *North Amer. Review*, No. 204 (July, 1864).

† *Blake v. Blake*, 7 Iowa, 46.

Dower is Restored if the Deed of the Husband be Avoided.—The wife's joining in the deed has no further effect than to relinquish dower, where the property is that of the husband, it is the release of a future contingent right, and her deed is not regarded as aliening a real subsisting estate. Says Mr. Scribner:* “Her renunciation of dower is to attend the conveyance of her husband, to endure while it endures, and no longer. Hence, if the conveyance of the husband be inoperative, or if it be set aside, or avoided, the right of dower remains unimpaired.” Therefore if the wife join in a conveyance with the husband which is afterwards declared fraudulent as to creditors, her right to dower or homestead is not defeated.† Consequently the wife is not estopped from setting up a subsequent title.‡ Where the interest of the wife is dower, it is released in order that it may be united with the fee; it is not conveyed by the wife as a separate particular estate.

On the other hand, a wife is not dowable out of land which, *before the marriage*, her husband had conveyed in fraud of his creditors, and which the creditors have had set aside by a proceeding in equity; for the conveyance, though void as to the creditors, was good against him; and hence there was not, during the coverture, any seisin in him which would support the right of dower.§

But it will appear in another place that where the wife is the *owner* of the land, or is exercising a statutory power to convey, joins with her husband in a deed which contains covenants of warranty, the deed will operate against her as an estoppel, so that she cannot afterwards assert a title to the same land,|| or deny that she had title at the time she executed the deed; nor can any one claiming through her.

* 2 Scrib. Dow, ch., 12, § 49; *Blaine v. Harrison*, 11 Ill., 384; *Clawes v. Dickenson*, 5 John. Ch., 235.

† *Stinson v. Summer*, 9 Mass., 143; *Robertson v. Bates*, 3 Metc., 40; *Summers v. Babb*, 13 Ill., 483; *Morton v. Noble*, 57 Ill., 176; *Richardson v. Wyman*, 62 Maine, 280; *Cox v. Wilder*, 2 Dill, 45; *Woodworth v. Paige*, 5 Ohio Stat., 70; *Crummen v. Bennet*, 68 N. C., 494; *Smith v. Rumsey*, 33 Mich., 183; *Murphy v. Cranch*, 24 Wis. 365; *Wood v. Chambers*, 20 Texas, 247; *Miller v. Inderreiden*, 79 Ill., 382; *Chambers v. Sallie*, 29 Ark., 407; 54 N. H., 478.

‡ *Blaine v. Harrison*, 11 Ill., 384.

§ *Whitehead v. Mallory*, 4 Cush., 138; *Gross v. Large*, 70 Mo., 45.

|| *Nash v. Shofford*, 10 Metc., 192; *Fowler v. Shearer*, 7 Mass., 14–21; *Hill*

Thus it appears that the wife's joining in the deed to convey the husband's title, is no estoppel against the wife. In other words, the covenants in the husband's deed is not an estoppel on the wife.

It may be observed that a release to a stranger is no bar to dower. There must be some privity of estate.

Upon this principle, if husband and wife execute a deed of trust, and the lands are subsequently sold in satisfaction of a mechanic's lien subsisting at the date of the deed, the purchaser takes the premises subject to dower.*

So it was held that where lands had been mortgaged to pay a debt, the wife joining in the mortgage, and afterwards the lands were sold under a judgment against the husband, at the suit of a stranger to the mortgage, the purchaser at such sale took subject to the wife's right to dower, the purchaser not being in privity with the mortgagee.† After the death of the husband, the wife may release to the terre-tenant.‡

Right of Dower in Defective Conveyances.—No power exists in the courts to compel a married woman to submit to a privy examination; so, if the husband covenants that he will procure his wife to undergo a privy examination, neither he nor the court can compel the performance. This must be of her own free will. And upon this principle, if a deed be defectively executed, it cannot be reformed as to the wife. As if a deed be not acknowledged by the wife, pursuant to the statute, the same cannot be set up in equity as against the wife.§

It may be remarked, that much of this learning in regard to the release of an inchoate dower, is now obsolete in England, and in many of the United States. For by the statute of 3 and 4 William IV., ch. 105, in England, and in many of the States,

v. West, 8 Ohio, 222; Fletcher v. Coleman, 2 Head (Tenn.), 384; 6 N. H., 17; 9 Gray, 217; Davis v. Tingle, 8 B. Mon., 543; 2 Kent Com., 167.

* Gove v. Cather, 23 Ill., 634; 2 Scrib. Dow., ch. 12, § 41.

† Taylor v. Fowler, 18 Ohio, 567; Harrison v. Eldridge, 2 Halst., 392; 2 Scribner, ch. 12, §§ 40, 41, 50.

‡ 1 Roper, H. & W., 563; Gray v. McCune, 28 Penn. Stat., 447; Matlack v. Lee, 9 Ind., 298.

§ Martin v. Dwelly, 6 Wend., 9; 2 Scrib. Dow., ch. 13; Atwater v. Buckingham, 5 Day, 492; 2 Kent, 141; 17 Ohio, 105; 12 Mich., 193.

the husband can convey his lands free from his wife's dower. This is so in all those States in which dower is confined to the lands which the husband may own at his death. But in those States where the common-law right of dower exists this discussion is appropriate. As to the law of dower, as affected by statute in the several States, consult ch. 2 of Scribner on Dower, vol. i. However, since Mr. Scribner's work was published (1864), the law of dower has been changed in some of the States, notably in North Carolina. In this State the Act of 1866-67 restored the common-law right of dower which prevails in that State at this time.

Privy Examination and Acknowledgment.—In the chapter on the wife's separate estate, and her power to convey the same, the privy examination and acknowledgment of the wife is discussed to a limited extent, and the subject will not be further treated in detail; but the practitioner is referred to the second volume of Mr. Scribner, ch. 13, for a comprehensive view of the statutes and decisions of the several States on this point. In most of the States the deed of the wife is absolutely void, except she acknowledge the execution of the deed, separately and apart from her husband, to be her free and voluntary act. And the same formalities are required to release the inchoate right of dower.

This was so in reference to fines in England. The statute, *de modo levandi fines*, required that, where a married woman was made a party to a fine, she should first be examined by the justice to ascertain her consent; and this private examination was used as well where the woman joined in a fine to extinguish her dower, as where it was levied as a conveyance of her estate.* But the statute of 3 and 4 Will. IV., ch. 74, abolishes fines and recoveries in England, and the conveyance by deed is substituted in their stead. By this statute a married woman must acknowledge on separate examination. So the statutes of each State, and the adjudications thereon, must govern the transmission of title, or the release of dower therein.†

Limitations as Affecting Dower.—Judge Kent, in his Lecture which treats of dower, says, in England there is no bar by the

* 18 Edw. I.; 2 Inst., 515; Shep. Touch., 5; Park, Dow., 194. See 2 Scrib., ch. 13, § 1.

† Jones v. Powell, 6 Johns. Ch., 194.

statute of limitations in dower. This was true at the time Judge Kent wrote, which was prior to the English statute of 3 and 4 Will. IV., ch. 27, which provides that no suit for dower shall be brought after twenty years from the death of the husband. The rule on this subject is not uniform in the several States, but many of them embrace dower in the statute of limitations.

Judge Kent, in the case of *Jones v. Powell*, intimated that dower was barred by the Act of 1801, but the Act of 1806 repealed the same. Now dower is barred in New York in twenty years.*

In Massachusetts, New Hampshire, Maine, Ohio, New Jersey, Mississippi, and perhaps others, the limitation is twenty years.† In some of the States the limit is five or seven years. But the tendency of all the decisions is that dower is not included in the general statute of limitations, unless especially mentioned; the reason usually assigned is that the possession is not always of that adverse character which is a main reason for the statute generally.

In the case of *Guthrie v. Owen*,‡ the Supreme Court of Tennessee held that the dower was not barred by the 2d section of the Act of 1819, ch. 2, and the argument was thorough and forcible; they say, in speaking of certain rights which are barred in England and this country: "But very different are the relations existing here, in point of title, between the widow and the heir. Neither the title nor the possession of the heir is adverse to that of the claimant of dower, nor is it in any way inconsistent with it. The title to dower is involved and inherent in that of the heir; his seisin and possession, although for himself, inures also to the benefit of the claimant in dower; his possession, indeed, may protect, but it cannot destroy the right of dower, un-

* New York Revised Statutes, p. 742, § 18. This act was construed to act prospectively only, and did not apply where the husband died before the act passed: *Sayre v. Wisner*, 8 Wend., 661.

† *Conover v. Wright*, 2 Halst. (N. J.), ch. 613; *Barnard v. Edwards*, 4 N. H., 107; *Durham v. Angier*, 20 Maine, 242; in accord, *Allen v. Allen*, 2 Penn., 311; Mass. Stat., ch. 90, § 6; *Tuttle v. Wilson*, 10 Ohio, 24.

‡ *Guthrie v. Owen*, 10 Yerger, 339; see *Smart v. Waterhouse*, 10 Yerg., 94; but, in *Carmichael v. Carmichael*, 5 Hump., 96, the widow was barred after twenty years, having voluntarily relinquished possession, and the tenant not holding under the heir was distinguished from *Guthrie v. Owen*.

less the second section of the Act of 1819 shall constrain us to give to it an effect so little in harmony with the relations which exist between the title of the heir and dowress." The court further said, in speaking of the title and possession: "Their operation should sustain, not destroy, should give effect to, not defeat the title in dower. In this case, indeed, it is not the heir but a purchaser of the title who insists upon the statute of limitations. But we think that the same relations exist between such purchaser and the claimant of dower, and the title remains precisely in the same attitude as in the case of the heir himself."

This reason is conclusive against the idea of dower being within the ordinary statute of limitations, either English or American.

In North Carolina, in the case of *Spencer v. Weston*,* it was held that the claim for dower was not such "right or title" to the land, within the meaning of the Act of 1715, as to be affected thereby. And, therefore, the dower right was not within the statute of limitations.

The court said, in that case: "A widow before assignment of dower has neither any 'right or title' to the lands of which her husband was seised, she has only an interest in the lands for dower." The recent code (1868) of North Carolina† repeals the old statute of limitations, and substitutes another, with some changes; but, in reference to the possession of seven years, the statute uses the words "right or title," which will not include a claim for dower under the reasoning in *Spencer v. Weston*.

The Statute of 1868 does not mention the claim for dower, and we conclude from the wording of the same, that dower is not included in the present statute of limitations in North Carolina.

In Missouri, the claim for dower is not included in the statute of limitations for that State.‡

The statute of Georgia, passed in 1839, required the widow to make application for dower within seven years after the death of her husband.§ We are not apprised that the rule has been changed under the new constitution and recent legislation in that State. Prior to 1826, the right of dower in Georgia stood as at common

* *Spencer v. Weston*, 1 Dev. & Bat., 213; in accord, *Campbell v. Murphey*, 2 Jones Equity, 357; see also, *McMillan v. Turner*, 7 Jones Law, 435.

† *Battle's Revisal*, ch. 17, § 20.

‡ *Littleton v. Patterson*, 32 Mo., 357.

§ *Tooke v. Hardeman*, 7 Ga., 20; Act Dec. 21, 1839.

law ; since then, the husband can convey without the consent of the wife. In South Carolina, under the peculiar wording of the statute, the right to dower is subject to the five year limitation of that State.*

Michigan and Iowa hold that the right to dower is not within the statute of limitations.†

The right of action which a widow has, begins on the death of her husband. In some of the States she is required to make demand of the tenant before she sues for dower ; in this instance the right to sue would not commence until after the demand. As a general rule, both in the United States and in England, statutes of limitations do not *ex vi termini* extend to suits in chancery.‡ But, in both countries, courts of equity constantly admit their obligation, and act, not only in analogy, but in obedience to their provisions.§ And courts of equity more readily yield to the statute of limitations, as fixed for courts of law, for the reason that all "stale" demands are received with disfavor in this tribunal, while diligence is encouraged rather than unreasonable negligence. Says Judge Story: || "A defence peculiar to courts of equity is that founded upon the mere lapse of time and the staleness of the claim, in cases where no statute of limitations directly governs the case. In such cases, courts of equity act, sometimes, by analogy to the law, and sometimes act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands by refusing to interfere where there has been gross laches in prosecuting rights, or long and unreasonable acquiescence in the assertion of adverse rights." Under this principle a court of equity would repel an application for dower in certain instances

* Boyle v. Rowand, 3 Desauss., 555; Ramsey v. Dazier, 1 Conn. Court (Treadw.), 112. But later cases hold differently in that State; see Wilson v. McLenaghan, 1 McMullen Eq., 35; Caston v. Caston, 2 Rich. Eq., 1; Pickard v. Talbird, Rice Eq., 158.

† 1 Mann, 1; 6 Clark, 106.

‡ In the case of Spencer v. Weston, 1 Dev. & Bat., 214, the court of North Carolina held that where the application was not made for dower until after eighteen years, the Act of Limitations of 1715 did not bar, because she had not such "right or title" as required her to sue under that act. And the court refused to consider the question of "lapse of time," because it was not pleaded in the action. It was also held in this case that damages could not be recovered for the time anterior to demand for assignment.

§ 2 Scribner, Dower, ch. 20, § 13.

|| 2 Story Eq., § 1520.

of unreasonable delay, even where there was no statute of limitations.*

Assignment of Dower by Metes and Bounds as against the Heir or Devisee.—It has already been stated that when the estate shall admit of it, the dower shall be assigned by metes and bounds.

The sheriff is a mere ministerial officer, and can only assign according to law. The same rule applies where commissioners are appointed under a statute. Under this general doctrine, it has been held competent to assign the *whole* of particular rooms in a dwelling-house, and in a New York case,† where the estate consisted of a village-lot and dwelling-house thereon, particular rooms were assigned to the widow, with the right of using the stairways, halls, etc., so as to afford ingress and egress. So, in Massachusetts,‡ upon an assignment of dower, there was set off to the widow the southerly half of a dwelling-house, with various designations as to garret, cellar, etc.

In several of the States, especially Alabama, Mississippi, Florida, Tennessee, and North Carolina, the statute especially requires the dwelling-house, where the husband was accustomed to live, to be included in the assignment to the widow. But under these statutes it has been held that, if it shall appear to the court that the whole of the dwelling-house and other improvements cannot be applied to the use of the widow, without manifest injustice to the heirs, then the widow shall take such portion as is reasonable and just.§

It has been held under these statutes that the widow is not entitled to an assignment to all of the husband's real estate, even where it is supposed necessary for her support.|| Neither is it lawful to assign the widow a portion of the land in fee, for this would in effect make her a co-heir.¶ It is not allowable to give

* On this point, see *Ralls v. Hughes*, 1 Dana (Ky.), 407; *Kiddall v. Trimble*, 1 Md. Ch. Dec., 143; *Chew v. Farmers' Bank*, 9 Gill (Md.), 361.

† *White v. Story*, 2 Hill, 543; *Parks v. Hardy*, 4 Bradf., 15; see *Stewart v. Smith*, 35 Barb., 167; *Patch v. Keeler*, 27 Vermont, 252.

‡ *Symmes v. Drew*, 21 Pick., 278; 2 Scribner, ch. 21. As to similar mode of assignment, see *In Matter of Watkins*, 9 John., 245.

§ See 2 Scribner, Dow., ch. 21, § 8, and notes.

|| *Stiner v. Cawthorne*, 4 Dev. and Bat. Law, 501.

¶ *Wilhelm v. Wilhelm*, 4 Md. Ch. Dec., 330.

the widow the privilege of cutting firewood and feeding stock upon the land not set off for dower.* The report of the sheriff, or commissioners, should describe the property assigned with reasonable certainty; a vague description is sufficient ground to set aside the assignment.† In Kentucky, the return of the commissioners, that they had assigned for dower "four acres around the house," was held too indefinite.‡ It is not competent to show by parol what lands are included in the assignment.§ Putting the dowress in possession is sufficient, though she may have a husband.|| The statutes of the different States, in regard to the assignment by metes or bounds, or otherwise, may change in some particulars the rules of the common law. Each statute is susceptible, perhaps, of a difference in construction by the several courts, and to these attention is necessarily required for the complete understanding of the modern law of dower.

As to Improvements by the Heir before Assignment.—Mr. Scribner says: "It seems to be settled that if the heir, after the husband's death, improve the estate, and its value is thereby enhanced, the widow will be entitled to her dower of the lands so improved, without any allowance to the heir on account of his expenditures or labor."¶ Some of the authorities suggest, as a reason for this rule, that it is folly of the heir to make improvements before the assignment of dower; but Mr. Justice Story** dissents from this view, saying that Lord Coke, nor any of the old authorities, had not given this reason. He then reasons from the case of a disseisin, in which, if the disseisor build upon the land which he hath by disseisin, and the disseisee afterwards enter, the latter shall have the buildings as well as the land; that the title and seisin of the soil, upon a recovery at common law,

* Jones v. Jones, Busbee's Law Rep., 117.

† Pierce v. Gregory, 2 Penning., 709.

‡ Stevens v. Stevens, 3 Dana, 371.

§ Young v. Gregory, 46 Me., 475.

|| Adams v. Barron, 13 Ala., 205.

¶ 2 Scribner, Dow., ch. 21, § 30; 4 Kent, 65; 1 Washburn, R. Property, 2d ed., 236; Hale v. James, 6 John. Ch., 260; Catlin v. Ware, 9 Mass., 218; Thompson v. Morrow, 5 Serg. & R., 289; McClanahan v. Porter, 10 Mo., 746; Coke Littleton.

It is supposed that, in Manning v. Laboree, 33 Me., 343, the court overlooked the distinction taken between improvements made by the heir and those made by the alienee of the husband.

** Powell v. Mon. and Brimf. Man. Co., 3 Mason, 347, 367.

carry everything annexed to the freehold as an incident. He says that, if a recovery be upon a title paramount against any person, though he may be a *bona fide* purchaser, and have made improvements on the land, yet the common law gives the demandant a perfect title to all the improvements, as well as to the land. He says: "It is true that, in the case of the heir, he is in by descent, and so his possession, being cast upon him by the law, may seem rightful; but when the wife is endowed upon a recovery from the heir and assignment of dower, she is in from the death of her husband, and the heir's possession is avoided, and, by consequence, there is no right of possession as to this third part acquired to the heir, since the law doth not place him in such third part after the death of the father." "The rule, therefore, that subjects the improvements, as well as the land in possession of the heir, to the claim of dower, seems a natural result of the general principles of the common law, which gave the improvements to the owner of the soil." So, if lands, which have been sown by the heir, be assigned to the widow for her dower, she takes the growing crops.* This rule, however, of giving the widow the benefits of the improvements made by the heir, has been changed by statute in New York, Kentucky, Ohio, New Hampshire, and others.† It would seem to result, that, inasmuch as the widow is entitled to the advantage of improvements, she should submit to her proportion of the loss from unavoidable diminution of value, and such is the rule. As against the heir, the widow takes the estate according to its value at the time of the assignment of dower.

But it was held in North Carolina‡ that, where buildings subject to dower had been insured, and after the death of the husband they were destroyed by fire, the widow was entitled to a share of the insurance-money, to be estimated according to the proportion of her interest in the estate.

Assignment by Metes and Bounds as against the Alienee of the Husband.—Under the English rule, the widow is entitled to the benefit of all improvements made by the alienee of the husband,

* 2 Scribner, Dow., ch. 21, § 33, and cases cited; *Parker v. Parker*, 17 Pick., 236; *Ralston v. Ralston*, 3 G. Greene (Iowa), 533.

† See notes to 2 Scribner, Dow., ch. 21, § 38.

‡ *Campbell v. Murphy*, 2 Jones Eq., 357.

the same as if made by the heir.* This rule was opposed by some of the ancient authorities, and in the United States an entirely different rule prevails.† Decisions in almost all the States, sustain this doctrine.‡ The reasons given in the books for the rule being different as between the widow and heir, from that between the widow and the alienee of the husband as to improvements, are not very satisfactory, but the rule is well settled in America, that when the dowress sues the alienee of the husband, she is bound by the value of the lands at the time of the alienation by the husband, and not at the date of the assignment. This, therefore, is directly the opposite of the rule just stated in the case where the suit for dower is against the heir.

The date of the execution and delivery of the deed is the date of the alienation for the purposes of this rule. If the husband give a title bond and deliver possession, and afterwards the purchaser pay the money, and a deed is made, the date of the title-bond fixes the date of the alienation.

The Alienee Must Make his Plea.—When sued by the widow, if the alienee has claim for improvements, he should without controverting the right to dower, set up his claim by the appropriate pleading upon the record.

As to pleading and practice, and also the mode of ascertaining the value of improvements in which the alienee claims protection, see cases cited in note.§

Dower Attaches to the Increased Value from Extrinsic Causes, whether against the Heir or Alienee.—In the doctrine, that the widow is entitled to her proportion of the increased value of the estate from extrinsic causes, the English and American authorities most generally agree.||

The point was first discussed by Chief Justice Parsons, of Mas-

* 41 Eng., C. L., 728; Park, Dower, 255; 2 Scrib. Dow., ch. 22, § 5.

† 4 Kent., 65, 66; Gore v. Brazier, 3 Mass. 523; Perry v. Goodwin, 6 Mass., 498; Ayer v. Spring, 9 Mass., 8; Ware v. Catlin, 9 Mass., 218; and several New York cases to the same effect; Thompson v. Morrow, 5 Serg. & R., 289; Campbell v. Murphey, 2 (N. C.), Jones Eq., 257.

‡ See full reference to cases in 2 Scribner, Dow., ch. 22, § 23.

§ Humphrey v. Phinney, 2 John., 484; Daff v. Bassett, 15 John., 21; Allen v. Smith, 1 Cow., 180; Taylor v. Brodrick, 1 Dana (Ky.), 345; 6 McClain, 422; 2 Scribner, Dow., ch. 22; Gore v. Brazier, 3 Mass., 523; 3 Mason, 347.

|| 2 Scribner, Dow., ch. 22, § 35.

sachusetts, in *Gore v. Brazier*.^{*} But as the point was not in judgment, it is not binding authority. But subsequently in the Supreme Court of Pennsylvania, in *Thompson v. Morrow*,[†] the point is directly decided in favor of the widow. The estate was situate in the city of Pittsburgh, which had been improved by the purchaser, and had greatly increased in value by the growth of the city and other causes distinct from the building improvement. Chief Justice Tilghman said: "So far as concerns the improvements made by the alienee, it is agreed that the tenant shall be protected from this hardship; but as to any value which may chance to arise from the gradually increasing prosperity of the country, and not from the labor or money of the alienee, it would be hard indeed upon the widow if she were precluded from taking her share of it. She runs the risk of any deterioration of the estate which may arise, either from public misfortune, or the negligence, or even the voluntary act of the alienee." Judge Story,[‡] in an elaborate review of the authorities, sustained the views of Tilghman, C. J.

Mr. Story said: "The doctrine appears to me to stand upon solid principles, and the general analogies of the law. If the estate has, in the intermediate period, risen in value, she receives the benefit; if it has depreciated, she sustains the loss."

But in the State of New York, the rule seems to be settled otherwise, the widow being limited in the estimation of value to the period of alienation. In *Dorchester v. Coventry*,[§] the court held that no distinction could be made between improvements and the increased value of the land. It seems that Chancellor Kent and Judge Story differed on this point, at least as to what was the common-law rule, because Judge Story, in the case of

^{*} *Gore v. Brazier*, 3 Mass., 523, 544.

[†] *Thompson v. Morrow*, 5 Serg. & R., 289.

[‡] *Powell v. Monson & Brimfield Manuf. Co.*, 3 Mason, 347; and to the same purport, *Carter v. Parker*, 28 Maine, 509; *Dunseth v. Bk. U. S.*, 6 Ohio, 76; *Allen v. McCoy*, 8 Ohio, 418; *Throp v. Johnson*, 3 Ind., 343; *Mahoney v. Young*, 3 Dana, 588; *Lewis v. James*, 8 Hump., 537; *Summers v. Babb*, 13 Ill., 483; 10 Mo., 746; *Campbell v. Murphey*, 2 Jones Eq., 357; 6 Halst., 395; 1 Md. Ch. Dec., 452; 2 Harring., 336; 6 McClean, 422; *Woolridge v. Wilkins*, 3 How. (Miss.), 360.

[§] *Dorchester v. Coventry*, 11 John., 510; see, in accord, *Allen v. Smith*, 1 Cow., 180; *Walker v. Schuyler*, 10 Wend., 480; *Daff v. Basset*, 15 John., 21.

Powell v. Monson & Brimfield Manufg. Co., referring to Chancellor Kent's opinion in *Hale v. James*,* says in substance, that the question was not before the court, but he differed with Mr. Kent as to the rule of the common law as stated. But in his *Commentaries*, Judge Kent takes the view of the rule adopted by most of the States.† But, notwithstanding the position of these great Judges, the Supreme Court of New York, in *Walker v. Schuyler*,‡ held that the widow was not entitled to the proportion of the enhanced value of the estate.

Virginia, too, holds that the widow is excluded from the advantages resulting from the enhancement of value of the estate from extrinsic causes.§ Similar to New York and Virginia have been holdings in South Carolina,|| and Alabama.¶ Statutes in Michigan, Wisconsin, Minnesota, and Oregon, confine the valuation to the period of alienation, thus disallowing the widow the advantage of an enhancement of value from extrinsic causes..

Deterioration in the Hands of the Alienee.—It is generally conceded by the American authorities that the widow has no remedy for waste committed by the alienee during the lifetime of the husband. And the rule is the same as to diminution of value before the assignment of dower, proceeding from natural causes.** But if the waste is committed *after* the death of the husband, it may be that the rule is quite different. In New York we have seen that the period of alienation is taken as the date at which the value of the estate is to be estimated. Under this rule it would seem to follow that no depreciation after that time can lessen the value of the share of the widow.††

It might be observed at this place that frequently the purchaser has the equity of exoneration from the charge of dower, where the husband died seised of other lands. Thus, in *Ken-*

* *Hale v. James*, 6 John. Ch., 258 (1822).

† 2 Scribner, Dow., ch. 22, § 42; 4 Kent, 68, note.

‡ *Walker v. Schuyler*, 10 Wend., 480.

§ *Tod v. Baylor*, 4 Leigh, 498.

|| *Brown v. Duncan*, 4 McCord, 346.

¶ *Beaver v. Smith*, 11 Ala., 20; *Francis v. Garrard*, 18 Ala., 794; *Thrasher v. Pinckard*, 23 Ala., 616.

** 2 Scribner, Dow., ch. 22, § 48; *Braxton v. Coleman*, 5 Call., 433; 4 Kent, 67; 1 Washburn, R. Property, 237 (2d ed.).

†† *Hale v. James*, 6 Johns. Ch., 258.

tucky,* the husband had sold not a distinct tract, but only a portion of a larger tract. He died seised of the balance of the tract, and the court held that the widow should take dower in the portion of the tract not sold, it appearing that dower in the whole tract could be obtained out of the part unsold, thereby exonerating the alienee of the husband.

The Right of the Widow to Mesne Profits.—The widow is entitled to endowment immediately upon the death of the husband. Consequently, if the person whose duty it is to assign dower, holds the possession, he incurs a debt to the widow, which he is liable to pay, either in his lifetime, or through his personal representative. In equity, the tenant is regarded as holding the widow's one-third as a trustee, with whom he is bound to account.

The widow's right in equity to this account may be enforced against the heir or alienee, or their representatives, without regard to any previous demand by the widow for the endowment, or the circumstance whether the husband died seised or not, the title to mesne profits being inseparably attached to the right of endowment of one-third part of the estate.† In a court of law, a demand is necessary, upon the alienee especially, but in equity an account for mesne profits has been allowed without any demand, and even before the dower has been assigned.

As to the rule in equity, see the cases referred to in the note.‡ In North Carolina, under the old practice, it was held that after dower had been assigned at law, equity will not entertain a bill for mesne profits, unless there be some equitable circumstances, such as loss of title-deeds, or detention of such deeds, or a discovery is necessary.§

It is held, in Maryland, that a bill for rents and profits is premature until dower has been recovered, while the courts in Mis-

* *Lawson v. Morton*, 6 Dana, 471. To the same effect, *Wood v. Keyes*, 6 Paige, 478. See the English case, *Grigby v. Cox*, 1 Vesey, Sen., 517.

† 2 Scribner, Dow., ch. 26, § 1.

‡ *Hazen v. Thorber*, 4 John. Ch., 604; *Johnson v. Thomas*, 2 Paige, 377; *Sellman v. Bowen*, 8 Gill and J., 50 (Md.); *Tod v. Baylor*, 4 Leigh, 498; *Slat-ter v. Meek*, 35 Ala., 528; *Gordon v. Stevens*, 2 Hill Ch. (S. C.), 429; *Campbell v. Murphey*, 2 Jones Eq., 357; *Peyton v. Smith*, 2 Dev and B. Eq., 325; *Turner v. Morris*, 27 Miss., 733.

§ *Whitehead v. Clinch*, 1 Murphey, 128.

issippi will entertain a bill for mesne profits, even if the widow neglects to have dower assigned.*

Our limits will not allow a full discussion of all the technical rules, which prevail in England and America, on the right of the widow to recover damages in a court of law. For, at common law, no damages could be recovered by the widow, being entitled to the profits only from the time she obtained judgment. Then came the Statute of Merton, which was a remedial statute in favor of the widow.

But we will refer to Mr. Scribner on Dower, vol. ii., ch. 25, for a full reference to these complicated questions growing out of the effort to obtain damages in a court of law. Then, again, many of these nice distinctions and technical rules have ceased to be of great practical utility in most of the States, the mode of recovering dower, and damage and mesne profits, and other procedure pertaining thereto, being regulated by statute.

Excessive Assignment—Remedy of the Heir.—It is said that if the heir make the assignment, and be under no disability, and of full age, a court of law will give him no assistance, and that he is bound by the record.†

But if the heir were under age at the time of the assignment, a court of law protects him against an excessive assignment, and supplies him with a writ of admeasurement of dower.‡

Then it is said, if the sheriff assign dower contrary to the common right, when he might have assigned it regularly, this is an error in the execution, and the heir may take advantage of it. But a court of equity may entertain a bill against a partial assignment, especially if, in addition to being excessive, there are circumstances and facts showing fraud. Under the practice in the United States, the remedy for a partial or excessive assignment of dower may be furnished by the court in which the proceedings are had; and the time to raise the objection is when the sheriff or commissioners make their return to court of how they have executed their powers under the writ or order of the court.

* 2 Scribner, Dow., ch. 26, § 12 (note).

† 1 Roper on Husband and Wife, 407; 2 Scribner, Dow., ch. 28, § 1.

‡ 2 Scribner, Dow., ch. 28, § 2. As to the nature of the English writ of admeasurement, see Park on Dower, 273.

This question arose in North Carolina, in the case of *Stiner v. Cawthorne*,* and the court used the following language: "The Act of 1784 has not indicated the remedy for an illegal or excessive allotment of dower, but the usages of our courts have defined it, to wit, that when the report of the jury is returned, exceptions may be thereunto taken by any one thereby aggrieved, and the court will set aside the allotment and order a new allotment, if sufficient cause be shown." If the exceptions are acted upon, the party dissatisfied may appeal.

A court of equity, under proper circumstances, even after a considerable time from the original proceedings, may set aside the allotment of dower and order an assignment *de novo*.† And where the assignment was of the rents and profits, the allowance may be changed by filing a bill in equity, showing that the income had materially enhanced or lessened.‡ If a new allotment is made, and the widow has, in the mean time, made valuable improvements on the portion in excess, she is entitled to compensation for the same.§

Eviction of the Widow.—It is a rule of the common law, and which is generally recognized in the United States, that a widow who has been evicted of her dower, may be endowed anew of the remaining lands of her husband.|| By the common law, when the widow (especially the modern practice) was evicted by a title paramount, she could resort to a *scire facias* for a new assignment in the remaining lands. But in the United States, we suppose the practice prevails of assigning dower as though none had been made.¶

The Dower Estate after Assignment.—On the assignment and delivery of the possession to the widow, she becomes seised of the immediate freehold. In point of tenure, she holds of the heir,

* *Stiner v. Cawthorne*, 4 Dev. & Bat. L., 501; *Eagle v. Eagles*, 2 Hayw., 181. In South Carolina and Georgia the same practice is indicated: *Hawkins v. Hall*, 2 Bay., 449; *Chapman v. Schroeder*, 10 Ga., 321. Other States, if not all, have statutes regulating this practice.

† *Singleton v. Singleton*, 5 Dana, 87. ‡ *Gove v. Cather*, 23 Ill., 634.

§ 1 *Roper, H. & W.*, 409; 2 *Scribner, Dower*, ch. 28, §§ 16, 17 (note).

|| *Scott v. Hancock*, 13 Mass., 162; *Holloman v. Holloman*, 5 *Smedes & Marsh.*, 559; see statutes of several States; 2 *Scribner, Dower*, ch. 29; notes to cases and statutes.

¶ See *French v. Pratt*, 27 Me., 381, 396-7; 2 *Scribner, Dower*, ch. 29, § 10.

but in point of title she is *in* by her husband, and not the person making the assignment.

The following propositions may be stated as illustrative of the qualities and incidents of the dower estate:

1. The assignment defeats charges made by the husband alone, her title having relation to her husband's first seisin.

2. It is not chargeable with the debts of the husband, contracted during coverture, and she holds it discharged of any leases made by the husband.

3. It is only liable to incumbrances created before marriage, which are paramount to dower, her title in this regard having relation only to the time of marriage.

4. If the widow accept an assignment contrary to common right, she takes subject to incumbrances.

5. If the husband sow a crop and die, and the heir assign the land sown to the wife for her dower, she is entitled to the crop growing thereon, and not the executor of the husband.

6. If crops be planted at the death of the widow, the growing crops go to her administrator or executor, and not to the reversioner. As to such emblements, she stands as other life-tenants.

7. If the estate be subject to an incumbrance paramount to dower, and they are of such a nature as not to entitle the widow to have them satisfied from her husband's general estate, she will be obliged to keep down one-third of the interest.

8. The widow, as tenant for life, must pay all taxes assessed upon the lands assigned to her during her life, being in this regard like other life-tenancies.

9. At the death of the dowress, the heir or party owning the inheritance, is entitled to the immediate possession.

10. A person holding an estate in dower under the widow, cannot, after the termination of the estate, claim betterments against the reversioner.*

The dower estate may be liable for other charges not indicated in the foregoing propositions; thus, it was held in Tennessee, that she was bound to reimburse the proper corporate authorities for money expended in constructing a foot pathway in front of

* *Maddock v. Jellison*, 11 Maine, 482; *Wiltse v. Hoxley*, 11 Iowa, 44; Maine, 45; and as to the several propositions, see 2 *Scrib. Dow.*, ch. 30.

premises which had been assigned for dower, the requisite notice first having been given to construct it herself.*

Forfeiture of Dower, Waste, etc.—By the common law, if a woman was tainted of treason, murder, or felony, she lost her dower. Other cases of forfeiture were urged in olden times; thus it was said that, if the husband lie sick in the same house, and she will not come unto him, that she should forfeit dower.

But, says Mr. Scribner, "Except in cases of treason, the principles of the English law, relative to forfeiture for crime, appear to have no application to this country."†

The Constitution of the United States gives Congress the power to declare the punishment for treason, subject to a limitation that no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.‡ The Act of Congress, April 30th, 1790, provides that no conviction or judgment for offences therein enumerated, including treason, shall work corruption of blood, or any forfeiture of estate.

In July, 1862, during the civil war between the United States and the Confederate States, Congress passed an act providing for the seizure and confiscation, by proceedings *in rem*, of the estates of persons engaged in that war against the government of the United States. It is suggested that inchoate dower is not within the provisions of this act, as such a right is not an estate, and is not the subject of grant or conveyance.§

Under the feudal system, for reasons peculiar to that age, if the tenant conveyed a greater estate than he possessed, it worked a forfeiture of the estate; and this principle was attempted to be applied to the widow, who might make what is called a tortious conveyance; but this doctrine has no application to the United States. In the United States, with the exception of a very few early cases, either by statute or upon principles of law recognized in this country, it is held that the conveyance of the life-tenant does not work a forfeiture, but has the effect to pass whatever estate the tenant has, and no more.

* *White v. Nashville*, 2 Swan, 364.

† 1 Scrib. Dow., ch. 19, § 54; 2 vol., ch. 31, § 4.

‡ Const., Art. 3, § 3, subdiv. 2.

§ 2 Scrib. Dow., ch. 31, § 4; vol. i., Scrib., ch. 1.

This is regulated by statute in a great number of the States.*

Waste, as applied to the Dower Estate.—At common law the tenant in dower was punishable for waste. So was the tenant by curtesy. But the liability did not extend to the lessee for life, or for years. The reason given in the books why a tenant in dower or curtesy is impeachable for waste, and that the lessee for life or years is not, is, that in tenancies in dower and curtesy the tenant holds by operation of law; and this law, for obvious reasons, imposes the liability to waste as a quality of the estate. But, if the owner of the fee gives a lease for the life of another or for years, he has the power to provide in the contract against waste; if he fail to provide, the law leaves him to abide the result of his own contract. In England, however, by the statutes of Marlbridge† and Gloucester,‡ all this class of tenancies, including lessees for life and for years, were made liable to waste. The modern remedy for waste is a bill in equity to enjoin the commission of waste, where the injury would be irreparable, or a special action in the nature of waste to recover damages.§

The old technical actions and remedies for waste are now obsolete, and will not be explained at this place.

Waste is defined generally, says Mr. Scribner, "A spoiling or destroying of the estate with respect to buildings, wood, or soil, to the lasting injury of the inheritance. But no damage resulting from the act of God, as lightning or tempest, or from public enemies, as an invading army, or from the reversioner himself, is waste. There are two kinds of waste, *voluntary* and *permissive*. Voluntary waste is that which results from actual commission, as felling timber, defacing buildings, opening mines, and changing the course of husbandry. Permissive waste is that which results from omission, as suffering buildings or other improvements to go to decay."||

It seems that the widow is liable for both voluntary and permissive waste. The American doctrine of waste is somewhat varied from the English law. In several of the States it is pro-

* See 2 Scrib., Dow., ch. 31, for reference to the law and statutes.

† 52 Hen. III., ch. 2; 2 Inst., 144-5.

‡ 6 Edw. I., ch. 5; 2 Inst., 289; 2 Scrib. Dow., ch. 31.

§ 4 Kent, 77; Park Dow., 360.

|| Walker's Amer. Law, 2d ed., 272; 2 Bl. Com., 281; 4 Kent; 1 Wash. B. P., 107.

vided by statute that, if a dowress be guilty of waste, she forfeits the place wasted. Others of the States make the widow liable for waste, but no provision for forfeiture.* In a few of the States, as Massachusetts, Maine, New Hampshire, a widow is not dowerable of wild land, for the strict common-law reason that to clear the land, and fit it for cultivation, is waste.

But, as we have seen, in a large number of States a more liberal rule prevails, and dower may be assigned in wild land, and she may clear a portion of it for the purpose of cultivation; but in this she may be guilty of waste in not leaving sufficient timber for the permanent uses of the farm. This doctrine is discussed in Pennsylvania,† North Carolina,‡ Alabama, and other States.§

In Tennessee, it is not waste for the widow to cut timber from the land assigned, though it may not be necessary for her support, if she do not materially injure the inheritance, and leave sufficient for the permanent use of the estate so assigned.|| The general doctrine seems to be that it is not waste to destroy the timber necessary for cultivation, or repairing fences, etc., but that only is to be considered waste which is a substantial injury to the inheritance.

It is not waste in a tenant in dower to cut timber on one parcel of land to make repairs on another, notwithstanding the reversion of the two parcels may be in different persons.¶ It would, however, be waste to cut timber-trees, and sell them in exchange

* 2 Scrib. Dow., ch. 31, § 34, where all the statutes are referred to.

† *Hastings v. Cruckleton*, 3 Yeates, 261; *McCullough v. Irvine*, 13 Penn. Stat., 438; 1 Harris.

‡ *Dalton v. Dalton*, 7 Ire. Eq., 197; *Ballentine v. Poyner*, 2 Hayw., 110; *Ward v. Sheppard*, 2 Hayw., 283; *Parkins v. Coxe*, 2 Hayw., 339; *Carr v. Carr*, 4 Dev. and B. L., 179; *Davis v. Gilliam*, 5 Ire. Eq., 308; *Lambeth v. Warner*, 2 Jones Eq., 165; *Shine v. Wilcox*, 1 Dev. and Bat. Eq., 631; *Dozier v. Gregory*, 1 Jones L., 100.

§ *Alexander v. Disher*, 7 Ala., 514.

|| *Owen v. Hyde*, 6 Yerger, 334.

In this country, as in England, it is waste for the dowress to open and work new mines in the lands assigned. But if lands have been opened in the husband's lifetime, she may continue to work them, and enjoy the products; she may also cut fuel and timber to be used in mining: 1 Scribner, Dow., ch. 10, §§ 4-10; 2 Scribner, Dow., ch. 31, § 47 (note 5).

¶ 2 Scribner, Dow., ch. 31, § 46.

for firewood. Cutting and selling wood and timber off the farm is waste.*

It becomes a question for the jury sometimes to determine for what purposes the timber was cut,—whether for the purpose of clearing the land, or for sale.

In some of the States the dowress is liable to an action for waste if she neglect to pay the taxes; in others, she forfeits the estate.

The Effect of Sale for Taxes on the Inchoate Right of Dower.—It was held in Ohio that a sale of the land, in the husband's lifetime, for the payment of taxes, extinguishes the right to dower.† In Illinois, it is indicated, in *Finch v. Brown*,‡ that the question was undecided in that State; but, under the statute in that State, perhaps the tax sale would not divest dower.

It looks like the *laches* of the husband ought not to be the instrument by which the wife loses her right to dower. But the necessities of government can only be met by the taxing power, and if the wife's inchoate right to dower is thus extinguished, it is in the exercise of this great power of taxation. But the taxes might be considered as assessed against the husband's *interest* in the land; he is chargeable with the taxes; *his* property must be held for payment of the same. While the wife's interest is a contingent right—*she* is not charged with the tax—*she* has no notice that a charge is on *her* interest.

In North Carolina, it was held that where the widow, after the death of the husband, occupied his residence, his children, some of whom were of age, living with her, were under no obligation to pay the taxes accruing between the death of the husband and the assignment of dower.§ In the States where the common-law right of dower does not exist, this question is of no practical utility, as the husband can sell or lose by his *laches* the land, without affecting the right of the wife. She gets no dower, if he *owns* no land at his death.

* *Parkins v. Coxe*, 2 Hayw. (N. C.), 517. For a discussion of the doctrine of waste, see 2 Scribner, Dow., ch. 31; 1 Washburn, R. Property; 1 Hilliard, R. Property, ch. 18; 4 Kent, 76-82; 1 Greenl. Cruise, title 3, ch. 2, §§ 27, 28.

† *Jones v. Devore*, 8 Ohio Stat., 430. ‡ *Finch v. Brown*, 3 Gilman, 488.

§ *Branson v. Yancy*, 1 Dev. Eq., 77, 82.

CHAPTER XIX.

THE LIABILITY OF REAL ESTATE FOR THE DEBTS OF DECEASED PERSONS.*

(1.) *How Real Estate is Chargeable for Debts at the Common Law.*—At common law, then, *executors* and *administrators* were liable to the parties in interest—creditors, heirs, or legatees—to the extent of the personal estate vested in them by law; and *the heirs* were liable to creditors on such bonds, covenants, or other specialties, by which the deceased had bound himself and his heirs, to the extent of the real estate descended to them. The heir was not responsible to creditors generally, as was the executor or administrator; nor was his title by descent affected by his ancestor's debts, except where it was subject to a lien created by the ancestor himself, or by operation of the law,—as in cases of judgments, recognizances, mortgages, etc. Even in these cases the personal estate, in the hands of the executor or administrator, was the natural and primary fund to be resorted to in every instance for the payment of debts of every description contracted by the ancestor.† By several statutes‡ the real estate was subjected to the payment of debts; but these statutes, passed after the settlement of the American colonies, are of no force in America. At common law, therefore, the executor or administrator

* In 1882, the Review Publishing Company of St. Louis issued in pamphlet form, an article, written for the *Southern Law Review* by the Hon. J. G. Woerner, Judge of St. Louis Probate Court. The subject of this article is indicated by the heading to this chapter. The author has obtained from Judge Woerner permission to use the same. It is the most interesting, thorough and practical view of the question which has ever been written, and is to form a part of the forthcoming work by that distinguished lawyer on *American Administrators*. It is a source of regret that the limit of this volume will not allow the insertion of the entire article, only such selections being used as seemed most important when taken in connection with the general scope of this treatise. Judge Woerner is, therefore, entitled to the credit for this entire chapter.

† Per Harris, J., in *Evans v. Fisher*, 40 Miss., 643, 680, and authorities there cited.

‡ 3 and 4 Will. and M., ch. 14 (giving creditors a remedy against devisees); 11 Geo. IV. and 1 Will. IV., ch. 47 (on the same subject); 3 and 4 Will. IV. (making real estate of deceased persons liable for simple contract debts as well as specialties).

was not liable for debts of the testator or intestate, except so far as he had personal assets, or where the real estate was charged by the testator with the payment of debts.

(2.) *Liability of Real Estate for Debts in America.*—*How the Title descends; Interest of the Executor or Administrator.*—But, in America the real estate of decedents is, by force of statutes in all the States, made assets in the hands of the personal representative for the payment of debts of whatever degree, in all cases where the personal estate is insufficient for that purpose.* The interest of the personal representative, however, is that of a naked power to sell or lease for the purpose of paying debts only;† hence the title and its defence, the rents and profits, and the possession belong to the heirs and devisees, until they are divested by decree, and by the sale or lease for the payment of debts or legacies.‡ It follows that without an order of the court, directing him to take charge of the real estate for the purpose of selling or leasing it to pay debts or legacies, it is no part of the duty or authority of the executor or administrator to meddle with it, nor can creditors require them to account for the income.§ In some of the States no distinction is allowed in this respect be-

* 3 Redf. on Wills, 238, 239.

† *The State v. Hiron*, 1 *Houst.*, 252, 256; *Le Mayne v. Quimby*, 70 *Ill.* 399, 403; *Floyd v. Herring*, 64 *N. C.*, 409, 411; *Fike v. Green*, 64 *N. C.*, 665, 667; *Vaughn v. Delvatch*, 65 *N. C.*, 378; *Laidley v. Kline*, 8 *W. Va.*, 218, 228. In New Jersey, it is said that lands are not assets, but may be made so by sale, under order of the Orphans' Court: *Per Hornblower, C. J.*, in *O'Hanlin v. Den*, 20 *N. J. L.*, 31, 34. Hence the plea of *plene administravit* was there held good,—where the personalty, but not the real estate, had been exhausted,—until an order for the sale of the real estate had been obtained: *Haines v. Price*, 20 *N. J. L.*, 480, 486.

‡ *Aubuchon v. Lory*, 23 *Mo.*, 99; *Sturgeon v. Schaumburg*, 40 *Mo.*, 482, 485; *Vance v. Fisher*, 10 *Hump.*, 211, 213; *Smith v. McConnell*, 17 *Ill.*, 135, 142; *Phelps v. Funkhouser*, 39 *Ill.*, 401, 405; *Lane v. Thompson*, 43 *N. H.*, 320, 325; *Hillman v. Stephens*, 46 *N. Y.*, 278, 282; *Gladson v. Whitney*, 9 *Iowa*, 267; *Withers's Appeal*, 14 *Serg. & R.*, 185; *Romaine v. Hendrickson*, 24 *N. J. Eq.*, 231, 236; *Draper v. Barnes*, 12 *R. I.*, 156.

§ *Almy v. Crapo*, 100 *Mass.*, 218, 220; *Brush v. Ware*, 15 *Pet.*, 93, 111; *Griffith v. Beecher*, 10 *Barb.*, 432, 434; *Gregg v. Currier*, 36 *N. H.*, 200, 202, *et seq.*; *Bucher v. Bucher*, 86 *Ill.*, 377, 381, *et seq.*; *Levy's Estate*, 1 *Tuck. Sur.*, 148, 150; *Ritchie v. Bank of the United States*, 5 *Cranch Cir. Ct.*, 605; *Calhoun v. Fletcher*, 63 *Ala.*, 574, 580.

tween solvent and insolvent estates;* but in others the rents and profits of insolvent estates go to the administrator, who must, in such case, keep the premises in repair, and account for the net proceeds in his administration account.† Executors and administrators are liable to account for rents and proceeds of sale of real estate received by them as such, whether by order of court, or in pursuance of their legal authority, or otherwise.‡

Where the Personal Representative likewise Represents the Real Estate.—In some of the States provision is made by statute authorizing the executor or administrator to take charge of the real as well as of the personal estate of a decedent, and to collect the rents and profits thereof until the close of the ad-

* So in Maine: *Kimball v. Sumner*, 62 Me., 305 (where the administrators of an insolvent estate were held liable to the heirs for rents and profits received by them upon real estate, which they paid out to creditors). In Massachusetts: *Gibson v. Farley*, 16 Mass., 280 (in which case the editor remarks that it seems most agreeable with the spirit, if not the letter of the law, that the rents and issues of real estate, by whomsoever collected, should be holden in trust for the payment of debts, if necessary); *Fowle v. Swazey*, 106 Mass., 100, 107; *Boyn-ton v. Peterborough Railroad*, 4 Cush., 467. In Pennsylvania: *Schwartz's Estate*, 14 Penn. Stat., 42, 47 (per Bell, J.); *McCoy v. Scott*, 2 Rawle, 222 (holding that until the right of the heir is divested by the administrator, under an order of the Orphans' Court, it is as absolute as that of their ancestors).

† *Bergin v. McFarland*, 26 N. H., 533, 537; *Lucy v. Lucy*, 55 N. H., 9. The administrator has nothing to do with the realty, unless the estate is insolvent: *Bullock v. Sneed*, 21 Miss., 293.

‡ *Gamble v. Gibson*, 59 Mo., 585, 594; *Dix v. Morris*, 66 Mo., 514; s. c., 1 Mo. App., 93; *Gamage v. Bushell*, 1 Mo. App., 416; *Stiver v. Stiver*, 8 Ohio, 217, 220; *Campbell v. Johnston*, 1 Sandf. Ch., 148; *Hartnett v. Fegan*, 3 Mo. App., 1; *Stagg v. Jackson*, 1 N. Y., 206, 212; *Crowder v. Shackelford*, 35 Miss., 321, 358. But if the rents and profits are collected without lawful authority, the estate does not become liable thereby, and the administrator must account to the person entitled: *Rodman v. Rodman*, 54 Ind., 444, 447; *Hankins v. Kimball*, 57 Ind., 42; *Terry v. Ferguson*, 8 Port., 500; *Goodrich v. Thompson*, 4 Day, 215; *McCoy v. Scott*, 2 Rawle, 222. When the administrator has assumed to act as trustee of the intestate's real estate, he cannot demur to a bill charging him as such, and praying for his removal, and the appointment of a new trustee: *Le Fort v. Delafield*, 3 Edw. Ch., 32. But where he has mistakenly supposed that the rents were assets, and has actually paid some of the simple contract debts out of the same, he will not be estopped from insisting that the moneys thus received are not assets, when called to account by simple contract creditors: *Griffith v. Beecher*, 10 Barb., 432. Where the interest of a devisee in land has been improperly sold by an executor, he may waive the tort, and sue for the purchase-money: *Stoner v. Zimmerman*, 21 Penn. Stat., 394.

ministration.* In these States, possessory actions for the real estate may be brought in the name of the executor or administrator in the same manner, and with the same effect, as for personal property, and for the same reason cannot be maintained by the heirs or devisees until after settlement of the estate in the Probate Court.† In other States, the statute empowers executors

* For instance, in Alabama: *Philips v. Gray*, 1 Ala., 226. But it was held that, as between the administrator and the heir, the latter is not prevented from suing for and collecting the rent until the administrator asserts the power vested in him by actual notice to the tenant, or suit for the rent falling due after the death of the ancestor: *Masterson v. Girard*, 10 Ala., 60; *Harkins v. Pope*, 10 Ala., 493, 498. It is also held that this power is a special one, and must be executed in the manner pointed out by the statute; the land must be rented at public outcry: *Martin v. Williams*, 18 Ala., 190, 194; *Chighizola v. Le Baron*, 21 Ala., 406, 411. In Arkansas: *Menifee v. Menifee*, 8 Ark., 9, 21 *et seq.*; *Haynes v. Bessellieu*, 25 Ark., 499; *Carnall v. Wilson*, 21 Ark., 62, 64 *et seq.*; but neither personal nor real property can be sold without order of the Probate Court: *Tate v. Norton*, 4 Otto, 55, 58. In California: *Harwood v. Marye*, 8 Cal., 580; *Curtis v. Sutter*, 15 Cal., 259, 264; *Meeks v. Hahn*, 20 Cal., 620, 627; *Soto v. Kroder*, 19 Cal., 87; *Chapman v. Hollister*, 42 Cal., 462; *Page v. Tucker*, 54 Cal., 121. In Connecticut: *Lockwood v. Tracy*, 46 Conn., 447, 453. In Georgia: *Cofer v. Flanagan*, 1 Ga., 538, 540. Says Nisbet, J., rendering the opinion: "Our law has abolished, utterly, the distinction between personal and real estate, as it obtains in England; indeed, it has changed the whole British doctrine as to the descent of real estate. . . . The effect of these statutes is to give to the administrator the same power over real estate that he has over the personalty, and for the same purposes, to wit: First, payment of debts; and, secondly, distribution." . . . *Sorrell v. Ham*, 9 Ga., 55. In Nevada: *Estate of Millenovich*, 5 Nev., 161, 185. "Under the statute of this State, the executor and administrator have the possession and control of both the real and personal property belonging to the estate." . . . Per Lewis, C. J., p. 185. But where there are no debts outstanding against the estate, and no equities in favor of the administrator, it is held that the heirs have right of possession, and may bring action of ejectment in their own name: *Gossage v. Crown Point Company*, 14 Nev., 153, 156 *et seq.* In Texas: *Thompson v. Duncan*, 1 Texas, 485, 489. "The difference in the rule of the common law between land and personal property, never had existence in this country," says Lipscomb, J. "To keep real estate in families to give them greater influence, and support the dignity of the aristocracy, was the result of their form of government, and may be traced to the feudal ages." (P. 488.) "If he have a right to the possession, the care, and superintendence, in the course of his administration, it would seem to follow that he would have a right of action if the possession was withheld from him:" *Easterling v. Blythe*, 7 Texas, 210.

† See cases under the preceding note. Also, *Scott v. Newsom*, 27 Ga., 125 (holding that the failure of the administrator to bring an action to try the title to land claimed by the intestate cannot prejudice the heirs at law so as to bar

and administrators to take charge of real estate and receive the rents during the time of their administration, if they are necessary to pay debts, but not to the exclusion of the heirs until the power is exercised.*

Real estate which comes to the executor or administrator, in the course of administration, in lieu of personal property which constituted assets in his hands—as, for instance, real estate taken under execution for a debt due the decedent, or obtained by foreclosure of a mortgage after the death of the mortgagee—constitutes assets in his hands the same as personal property left by the decedent;† or it may be sold like real estate of which the decedent died seised;‡ or it may vest in the heirs, if not needed

their action under the statute of limitations); *Curtis v. Herrick*, 14 Cal., 117; *Williams v. Rawlins*, 10 Ga., 491.

* As formerly in Michigan: *Streeter v. Patton*, 7 Mich., 341, 350; *Kline v. Moulton*, 11 Mich., 370, 382. But the act giving them this authority was repealed in 1871, and their authority to hold real estate ceased: *Campau v. Campau*, 25 Mich., 127, 131. In Indiana the real estate may be leased by the administrator under order of the Probate Court, but the lease will not be valid unless there was notice to those interested in the realty: *Platt v. Dawes*, 10 Ind., 60. In Missouri, executors and administrators are authorized, under the direction of the Probate Court, to lease the real estate for a term not exceeding two years (which is in this State the minimum period of administration), to receive and recover rents, and maintain any action for the recovery of the possession thereof, as the testator or intestate might if living: *Rev. Stats.*, 1879, sec. 129. Before this revision, administrators were not allowed to maintain actions for the realty (*Burdynne v. Mackey*, 7 Mo., 374), nor for damages for injuries thereto after the intestate's death: *Aubuchon v. Lory*, 23 Mo., 99; but might bring action for unlawful detainer against a tenant to whom they had leased the property: *Lass v. Eisleben*, 50 Mo., 122. And where the property was leased by the executor under order of the Probate Court, the devisee could not maintain ejectment against the tenant while the estate remained unsettled: *Eoff v. Tompkins*, 2 Mo. App., 464; s. c. 66 Mo., 225. In New Hampshire, the administrator may collect the rents of real estate during the administration if the estate be insolvent, and in such case he is accountable to the judge of probate; but if solvent, to the heirs: *Lucy v. Lucy*, 55 N. H., 9, 10. In Vermont, the statute gives the right of action to administrators to recover land for the benefit of the heirs: *McFarland v. Stone*, 17 Vt., 165, 173. In Wisconsin: *Filby v. Carrier*, 45 Wis., 469, 471; *Jones v. Billstein*, 28 Wis., 221, 227; *Edwards v. Evans*, 16 Wis., 193; *Williams v. Sleusher*, 4 Chand., 155.

† *Baldwin v. Timmins*, 3 Gray, 302; *Boylston v. Carver*, 4 Mass., 598, 610; *Furlong v. Soule*, 39 Me., 122, where an executrix took a deed to her and "her heirs, assigns, and successors," in payment of a debt due to the estate, she took a fee-simple estate, which she had power to sell; *Greer v. Walker*, 42 Ill., 401.

‡ *Thomas v. Le Baron*, 10 Metc., 403; *Foster v. Huntington*, 5 N. H., 108.

to pay debts.* In Vermont, such land is held in the same manner and for the same purposes as land owned by the decedent at the time of his death.† So, real estate bought in by the administrator under sheriff's sale to enforce a judgment obtained by him against a person to whom he had loaned the money of the estate, and real estate purchased with the means of the estate, is assets, subject to a trust for the use of those beneficially interested in the estate.‡

The Power of the Executor or Administrator to Mortgage Real Estate.—In some of the States the Probate Court has authority to order the executor or administrator to borrow money and mortgage the real estate of the decedent as security for its repayment.§ In such case, if it becomes necessary to foreclose the mortgage to realize the money loaned, the purchaser or vendee is protected by the license of the Probate Court, without an investigation into the truth of the facts or representations upon which it was granted.|| But in Kansas, such power is held to be foreign to the purpose of administration, which aims to close up and not to continue an estate.¶

(3.) *Duties and Liabilities arising to the Executor or Administrator out of Real Estate.*—It results from the want of authority over or interest in the real estate, that executors and administrators are neither allowed nor bound to exercise any control over the same.** Thus, they are not allowed in their administration accounts credit for taxes paid by them, assessed against the real estate after the death of the testator or intestate; or for money paid in discharge of mortgages on real estate conveyed by him, or of which he died seised, which he was not personally bound

* Webber v. Webber, 6 Me., 127, 132; Pierce v. Strickland, 26 Me., 277, 290.

† Tryon v. Tryon, 16 Vt., 313, 317.

‡ Haynesworth v. Bischoff, 6 Rich. L., 159, 165; Shaw v. Thompson, 1 Smed. & M. Ch., 628; Everston v. Tappan, 5 Johns. Ch., 497; Van Horn v. Fouda, 5 Johns. Ch., 388. And there is nothing in the policy of the law prohibiting the administrator from conveying it: Hogan v. Welcker, 14 Mo., 177; Harper v. Mansfield, 58 Mo., 17, 22.

§ Spencer v. Bank of the State, 1 Bailey Eq., 468; Biles's Estate, 2 Brews., 609, 619; Steffy's Appeal, 76 Penn. Stat., 94.

|| Griffin v. Johnson, 37 Mich., 87. ¶ Black v. Dressell, 20 Kan., 153, 154.

** Baxter v. Robinson, 11 Mich., 520, 522. See also, Manning, J., separate opinion, 523.

to pay;* or for insurance of the real estate against loss or damage by fire; or in the discharge of mechanic's lien, or for annuities charged thereon;† or for improving the same by the erection or completion of buildings.‡ But it is equally obvious that where they are lawfully in possession, it is both their right and their duty to exercise the same diligence and prudence in protecting and preserving the same as if it were personal property under their charge. They are entitled, on the one hand, to credit for all expenses reasonably incurred in so doing, and liable, on the other hand, for all losses arising out of their negligence in the premises. Hence, it is the administrator's duty to restrain even an heir from trespassing upon real estate mortgaged to the intestate, upon which the administrator obtained judgment of foreclosure;§ and he may bring an action for possession.|| So, payment by an administrator of interest on a mortgage of land afterwards sold to pay the intestate's debts has been allowed, as being in protection of the interest of the estate.¶ Where real estate is in possession of the administrator, and capable of yielding rents, it is his duty to pay the taxes out of the rents; and if the rents are insufficient for such purpose, he will be allowed credit for money paid by him to redeem the land from tax-sales.** So, it is held in Mississippi that an administrator may lawfully redeem the realty of his intestate when sold to pay taxes, if he has reasonable ground to believe that it will be needed to pay debts.†† And where an executor, who was also trustee under the will, used the funds in his hands in the repair of the trust prop-

* *Willcox v. Smith*, 26 Barb., 316, 337; *Motier's Estate*, 7 Mo. App., 514, 518; *Deraismus v. Deraismus*, 72 N. Y., 154, 158. And if he purchase in a first mortgage, to protect a second mortgage held by the estate, the creditors may repudiate the purchase; the estate purchased will, in such case, belong to him individually: *Tomkins v. Weeks*, 26 Cal., 50.

† *Kimball v. Sumner*, 62 Me., 305, 311.

‡ *Byrd v. Governor*, 2 Mo., 102. § *Palmer v. Stevens*, 11 Cush., 147.

|| *Boylston v. Carver*, 4 Mass., 598, 608; *Richardson v. Hildreth*, 9 Cush., 225, 226.

¶ *Stillwell v. Melrose*, 15 Hun., 378, 381.

** *Cummings v. Bradley*, 57 Ala., 224, 239.

†† *Bowers v. Williams*, 34 Miss., 324, 326. And *a fortiori*, when he has been ordered to sell the real estate for the payment of debts, he may remove incumbrances by bill in equity, and have the title perfected, if conducive to the interests of the estate: *Williams v. Stratton*, 18 Miss., 418.

erty, and to keep down incumbrances upon them, it was held that equity would charge such premises in favor of the creditors of the deceased, to the extent of the amount so laid out upon them.*

(4.) *Of the Proceeding in Selling.*—(1.) *Imperative Necessity of a Strict Compliance with the Statutes.*—The power of executors and administrators to sell the real estate of deceased persons to raise funds for the payment of their debts is purely statutory. Each State prescribes the conditions and circumstances which authorize the sale, as well as the method of procedure in selling. We have seen that in some of the States the validity of the sales is made dependent upon a very rigid and literal compliance on the part of probate courts and executors and administrators with the statutory requirements; the slightest deviation therefrom, or negligence on the part of the courts or its officers in making the record entries, is held sufficient, even collaterally, to avoid the sale, and thus deprive the purchaser of the property which he honestly paid for. And while it is the manifest policy of the law to uphold judicial sales, and not to deter purchasers by encouraging the fear that their substantial rights and interests will be sacrificed to technical considerations; while courts will go very far to insure protection to innocent purchasers in collateral proceedings, even in cases of gross error and manifest wrong arising out of the blunders and carelessness of probate courts and their officers, it is obviously of the gravest importance that every step taken in subjecting the real estate to sale for the payment of debts be as nearly as possible in literal compliance with the requirements of the statute upon which the proceeding is based.† It is

* *Ferris v. Van Vechten*, 9 Hun., 12, 15. It was held in New Hampshire, that where a testator bequeathed one-half the rents, profits, and income of his estate to his wife, during life, and the other half to the executor, it is the right and duty of the executor to collect the rents while the property remains undivided, and pay one-half to the wife: *Madigan v. Burns*, 58 N. H. (reported in 12 Reporter, 213).

† *Wyman v. Campbell*, 6 Port., 219, 245 (announcing that where particular forms are pointed out for the execution of a power, however immaterial they may appear in themselves, these forms are considered as conditions, the observance of which cannot be dispensed with, and citing many authorities): *Kelly's Estate*, 1 Abb. (N.Y.), New Cas., 102, 107; *McFeeley's Estate*, 2 Redf., 541, 543; *Wortley v. Johnson*, 8 Ga., 236, 244; *Alabama Conference v. Price*, 42 Ala., 39, 49; *Finch v. Edmondson*, 9 Tex., 504, 512, *et seq.*; *Frazier v. Steenrod*, 7 Iowa, 339, 346; *The State v. Conover*, 9 N. J. L., 338; *Grass v. Howard*,

a pernicious error, fruitful of trouble and mischief, to suppose that a simple, inartificial, vague statement of the necessity to sell real estate to pay debts is sufficient, because the circumstances of the case are well known and understood by the court and the parties directly concerned; or that the honesty and good faith of the application are all that is necessary to do what is right. The anxiety of courts to vindicate the validity of judicial sales should not be relied on to furnish a pretext for the carelessness of executors and administrators, or supineness of probate courts, in the several steps connected with the sale of real estate; for even if the sale should be held good as against a collateral attack—and it is by no means easy or always possible to foresee the precise extent to which courts will go in that direction—yet many acts of commission or omission which will not be considered in a collateral investigation, may, in a direct proceeding, subject the administrator to serious liability, the estate to loss and delay, and all parties concerned to vexatious and oftentimes ruinous litigation. No part of an administrator's duty claims his closer attention and demands more imperatively professional advice and assistance than his duties and liabilities with regard to real estate. An instructive illustration of the difference between the precision and accurate compliance with the statutory regulations on this subject, which is held to be the duty of probate courts and executors and administrators, and therefore strictly insisted on in direct proceedings on error or appeal, and the liberality and indulgence extended to their proceedings when collaterally questioned, is furnished by the adjudications in Alabama. It is there held that defects and irregularities, which furnish good ground for reversal, are insufficient to invalidate the sale when collaterally impeached;* that the proceedings are *in rem*,† and “the petition need not pursue accurately the language of the statute; any words that necessarily

52 Me., 192, 195; *Knox v. Jenks*, 7 Mass., 488, 492; *Lowry v. McDonald*, 1 Smed. & M. Ch., 620; *Planters' Bank v. Johnson*, 7 Smed. & M., 449, 454; *Jackson v. Crawford*, 12 Wend., 533; *Haywood v. Haywood*, 80 N. C., 42; *Whitmore v. Johnson*, 10 Hump., 610 (this is a case in chancery); *Pettit v. Pettit*, 32 Ala., 288; *Monahan v. Vandyke*, 27 Ill., 154; *Gelstrop v. Moore*, 26 Miss., 206, 209; *Vance v. Maroney*, 4 Col., 47 (citing *Ventres v. Smith*, 10 Pet., 161, 175).

* *Doe v. Riley*, 28 Ala., 164, 180, 181.

† *Wyman v. Campbell*, 6 Port., 219, 232.

convey to the mind all that the statute requires will be sufficient, and the words shall be construed liberally and favorably to sustain the jurisdiction.”* But, in passing upon the sufficiency of a petition for the sale of lands on appeal, the failure to recite the ages of a married heir and her husband was held fatally defective, and the proceedings reversed.† So, also, upon the failure to recite the ages of the alleged heirs, although the probate court had appointed guardians *ad litem* to represent them in the proceeding.‡ See, also, the case of *Watson v. Collins*,§ in which it is held that the prior descent of the land of an intestate to his heirs, the payment of his debts, and the distribution of the personalty by the administrator-in-chief, will not render void an order of sale of the lands for division obtained by a legally appointed administrator *de bonis non*, although these facts may constitute a good objection in the probate court to the granting of the order.

(2.) *Who may Make the Application to Sell.*—In some of the States, creditors may apply to a court of chancery to subject the real estate of a deceased person to the payment of his debts, if the personal assets are insufficient.|| But it is usual in most of the

* *De Bardeleben v. Stoudenmire*, 48 Ala., 643, 647.

† *Page v. Matthews*, 41 Ala., 719, 720.

‡ *Griffin v. Griffin*, 3 Ala., 623, 625; *Cloud v. Barton*, 14 Ala., 347.

§ 37 Ala., 587; s. c. 1 Ala., Sel. Cas., 515.

|| As in Tennessee: *Frazier v. Pankey*, 1 Swan, 75, 79. Iowa: *Waples v. Marsh*, 19 Iowa, 381, 383. Kentucky: *Bedell v. Kuthly*, 5 T. B. Mon., 598, 600 (affirmed in *Burford v. McKee*, 3 B. Mon., 224, 225). Maryland: *Tyson v. Hollingsworth*, 1 Har. & J., 469, 470; *Gaither v. Welch*, 3 Gill & J., 259, 263. South Carolina: *Vernon v. Valk*, 2 Hill Eq., 257. Virginia: *Tennant v. Patterson*, 6 Leigh, 196. And where a court of chancery obtains jurisdiction over an estate, it will complete the administration, and, if necessary, direct the sale of the real estate in the same manner as prescribed by statute for sales under order of the Probate Court: *Wilson v. Crook*, 17 Ala., 59. Where the administrator fails or refuses to make the application, a creditor may make the application himself, or compel the administrator to do so: *Pelletier v. Saunders*, 67 N. C., 261; *Whisnand v. Small*, 65 Ind., 120, 123. In Wisconsin, the application may be made to the Circuit Court, but the inadequacy of the personal property must be ascertained by the court having probate jurisdiction: *German Bank v. Leyser*, 50 Wis., 258, 265. In Missouri, if the administrator fails to subject the real estate to pay the debts, the creditor may compel him to do so by giving proper notice, and if he then refuse to file the necessary accounts, lists of debts and inventories, he will be compelled to do so by attachment: *Grayson v. Weddle*, 63 Mo., 523. In Alabama, the widow was allowed to obtain an

States, and required by their statutes, that the application be made by the executor or administrator to the court having jurisdiction of the administration of the estate. Where the application is made *qua* administrator, the court has no power to order the sale to be made by one who has not been legally appointed; a sale by one who has not given the bond, and qualified and received letters as such, is void, even if the sale is ordered and approved by the Probate Court.* In Texas, an heir, legatee, or creditor must join the executor or administrator in making the application.† A special administrator, appointed for the purpose of temporarily preserving the estate, has no authority to make the application.‡ A license to one of several administrators or executors to sell real estate has been held void on the ground that where two or more persons are qualified as executors or administrators, their powers and duties are joint;§ but the reverse is also held,|| and it seems that on principle the latter

order for the reservation of the personal and sale of real property to pay debts, on the ground that she was interested in the result of such an order: *King v. Kent*, 29 Ala., 542, 550.

* *Pryor v. Downy*, 50 Cal., 388, 399.

† Since the Act of January 16th, 1843: *Miller v. Miller*, 10 Texas, 319, 333 (holding a sale decreed upon the petition of the administrator alone absolutely void).

‡ And can give no jurisdiction to the court. Hence a sale by him, or ordered upon his application, is void, even in a collateral proceeding: *Long v. Burnett*, 13 Iowa, 28, 34. But the special administrator may be continued in the management and charge of the estate, and will then be authorized to sell the real estate: *Reade v. Howe*, 39 Iowa, 553, 560.

§ *Hannum v. Day*, 105 Mass., 33, 35 (Wells, J., dissenting, on the ground that the jurisdiction of the court cannot depend upon the question whether the petition is signed by or made in behalf of all those who are joined in the general administration of the estate, and that even if the grant of license to one is irregular, the heir, or party claiming the land, is precluded from going behind the formal decree of the court): *Gregory v. McPherson*, 13 Cal., 562, 578; *Littleton v. Addington*, 59 Mo., 275, 278 (where two executors qualify, one alone cannot execute the power to sell).

|| *Jackson v. Robinson*, 4 Wend., 436, 442. And where there was a direction to two to sell, but the deed was executed by only one, equity will enjoin the heirs from prosecuting in ejectment to recover the land on the ground of the irregularity: *Wortmann v. Skinner*, 12 N. J. Eq., 358. In Michigan, a sale by one administrator against the protest and refusal of the other, which was otherwise regularly made and approved by the court, was held irregular and voidable, but not void, in a collateral suit: *Osmen v. Traphagen*, 23 Mich., 80, 86. So in North Carolina: *Blythe v. Hoots*, 72 N. C., 575, 577.

view is preferable. Cases may arise, in which the concurrence of all the executors and administrators cannot be obtained, in which event it should be within the power of the court to grant or withhold the order to sell, or to compel one of the executors, who refuses to join in the sale.* It has also been held, that a sale, made upon the joint application of the administrator and guardian of the infant heirs, not to pay debts, but to maintain the children and improve the property, is void.†

3. *What must be Shown on the Application.*—*The Existence of Debts.*—To authorize an order, decree, or license to an executor or administrator to sell the real estate of a decedent, it must be shown that there are debts, legacies, or expenses of administration for the payment of which the personal property is insufficient.‡ But no sale of real estate will be ordered to pay expenses of administration alone, if there are no debts of the decedent, or to reimburse the administrator for outlays made by him in the course of the administration, or to pay debts incurred by the executor or administrator after the death of the testator or intestate, except funeral expenses.§ It has been so held in Alabama,|| Illinois,¶ Massachusetts,** Mississippi,†† Missouri,‡‡ and New York.§§ In Maine the legality of a sale for the payment of expenses of administration has been questioned, but there is no

* *Love v. Love*, 3 Hayw. (Tenn.), 13. See *Southwick v. Morrell*, 121 Mass., 520 (intimating that the only remedy in Massachusetts is to procure the removal of the executor refusing by the probate court).

† *Newcomb v. Smith*, 5 Ohio, 447.

‡ 3 Redf. on Wills, 133, pl. 6.

§ Including a suitable tombstone: *Owens v. Bloomer*, 14 Hun, 296.

|| *Owens v. Childs*, 58 Ala., 113, 114.

¶ *Glancy v. Murray*, 49 Ill., 465, 468; *Walker v. Diehl*, 79 Ill., 473, 475; *Dubois v. McLean*, 4 McLean, 486, 489.

** *Dean v. Dean*, 3 Mass., 258, 262; *Drinkwater v. Drinkwater*, 4 Mass., 354, 358.

†† *Moore v. Ware*, 51 Miss., 206, 211 (following *Farrar v. Dean*, *infra*); *Hallman v. Bennett*, 44 Miss., 322, 325 *et seq.*

‡‡ *Farrar v. Dean*, 24 Mo., 16, 18 (holding a sale to pay expenses of administration void); *Presbyterian Church v. McElhinny*, 61 Mo., 540 (holding that there can be no legal administration for the mere purpose of paying debts incurred by the executrix after the testator's death).

§§ *Cornwall's Estate*, 1 Tuck. Sur., 250; *Fitch v. Witbeck*, 2 Barb. Ch., 161, 163; *Wood v. Beyington*, 2 Barb. Ch., 387, 393.

direct adjudication upon the point.* No decision is remembered in any State, by which a sale of real estate for the payment of expenses of administration alone is sanctioned, except an intimation in a very briefly considered case in Indiana,† and a case in California, in which the refusal to order the sale of real estate to pay the costs incurred in litigation concerning the will, was held to be error.‡

In Georgia, the ordinary set apart a lot of ground as the widow's allotment for support for twelve months, which was sold to raise the necessary money; and it was held that the heirs could not recover from the purchaser.§

Equitable Right of the Administrator to be Reimbursed for Debts paid by him in Excess of Personal Assets.—Where an executor or administrator has paid debts of the decedent in excess of the personal assets in hand, he will be subrogated in equity to the rights and standing of the creditors whose claims he has discharged. In such case it is incumbent upon him to prove, in the proceedings to subject the real estate to sale, the validity of the debts which he has paid; and the passing of the account in the probate court is not even *prima facie* proof thereof, or that they were chargeable upon the real estate, either at law or in equity.|| If he has paid debts barred by the statute of limitation,¶ or makes no application until after the time limited for the enforcement of claims of creditors,** or pays such debts voluntarily,†† or with the view of making the heir his debtor, so as to avoid the question of fully administered,‡‡ he will not be entitled to relief. In some of the States, for instance in

* *Grass v. Howard*, 52 Me., 192, 196.

† *Dunning v. Driver*, 25 Ind., 269, 270.

‡ *Abila v. Burnett*, 33 Cal., 658.

§ *Miller v. Defoor*, 50 Ga., 566.

|| *Gist v. Cockey*, 7 Har. & J., 134, 139; *Ex parte Street*, reported in 1 Bland, 532, note; *Watkins v. Dorsett*, 1 Bland, 530; *Pea v. Waggoner*, 5 Hayw. (Tenn.), 242; *Franklin v. Armfield*, 2 Sneed (Tenn.), 305, 356 *et seq.*; *Collinson v. Owens*, 6 Gill. & J., 4, 12; *Ingram v. Ingram*, 5 Heisk., 541; *Trumbo v. Sorrency*, 3 T. B. Mon., 284.

¶ *Gilchrist v. Rea*, 9 Paige, 66, 70 (opinion of the Surrogate), 73 (opinion of the Chancellor); *Pea v. Waggoner*, 5 Hayw. (Tenn.), 242; *Heath v. Wells*, 5 Pick., 140, 145.

** *Ex parte Allen*, 15 Mass., 57, 60.

†† *Sanders v. Sanders*, 2 Dev. Eq., 262, 264.

‡‡ *Williams v. Williams*, 2 Dev. Eq., 69, 71.

New York* and Massachusetts,† the probate court may order the sale in such case; and in Ohio, the sale ordered by a court of probate jurisdiction to reimburse an administrator for money borrowed to pay taxes assessed against the land, was sanctioned by the appellate court;‡ but it is doubtful how far sales of real estate, by order of the probate court, for the mere purpose of reimbursing an administrator for debts paid by him, will be sustained in other States, however appropriate such course would seem in view of the American theory of administration.§

The Insufficiency of Personal Assets, whether By or Without the Fault of the Administrator.—It must clearly appear that the personal assets are insufficient, and that they were so at the time of the grant of administration, to pay the debts and legacies, or that they have become so in course of the administration for causes beyond the control of the personal representative, and without fault on the part of the creditors or legatees.|| Where the personal property is originally sufficient for the payment of the debts, but becomes insufficient in consequence of *devastavit* or neglect of duty by the executor or administrator, or by distribution to the heirs or legatees, the latter may insist on this as a defence against the sale of land descended, and the only remedy of the creditors is against the administrator and the sureties on his bond.¶ But although the assets were ample at the time of the

* Jackson v. Halladay, 3 Redf., 379; Gilchrist v. Rea, *supra*.

† Ex parte Allen, *supra*.

‡ Welsh v. Perkins, 8 Ohio, 52.

§ See Titterington v. Hooker, 58 Mo., 593.

|| 3 Redf. on Wills, 238, pl., 19; Shields v. McDowell, 82 N. C., 137; Hall v. Sayre, 10 B. Mon., 46; Tilton v. Tilton, 41 N. H., 479, 482; Wiley v. Wiley, 63 N. C., 182; Martin v. Relehan, 3 W. Va., 480; Newcomer v. Wallace, 30 Ind., 216; Elliott v. George, 23 Gratt., 780, 783; Succession of Phelan v. Bird, 20 La. An., 355. In New York it is held that personal property, although bequeathed, must be resorted to for the payment of debts, before there can be a sale of real estate, unless a contrary intention is clearly expressed in the will; and the executor is accountable for such property, although he has delivered it to the legatee: Rogers v. Rogers, 3 Wend., 503, 531; but in the subsequent case of Corwin v. Merritt, this point was left open: 3 Barb., 341, 347. The insufficiency of the personal assets must appear after a proper accounting: Thompson v. Joyner, 71 N. C., 369. In Florida, the sale is void, unless it appear from the record that the personal assets were exhausted: Hays v. McNealy, 16 Fla., 409, 411.

¶ Bennett v. Coldwell, 8 Baxt., 483, 487; Merritt v. Merritt, 62 Mo., 150, 154; Turner v. Ellis, 24 Miss., 173, 180; Paine v. Pendleton, 32 Miss., 320, 323;

grant of letters, if they become insufficient in the course of administration, from any cause, without fault of the executor or administrator, and on account of which the creditors are without remedy, they may resort, through the executor or administrator, to the probate court for a sale of the land to pay the debts.* But in some of the States it is within the power of the probate court, if satisfied that such will conduce to the benefit of the estate, to order the whole or any part of the personal estate to be reserved, and the real estate to be sold for the payment of debts. So in Alabama,† Maryland,‡ Missouri,§ and New York,|| and probably in other States. It may be also stated here, that where, by operation of a stay-law, the collection of debts due to an estate is postponed, so that by reason thereof there is a temporary insufficiency of personal assets to pay the creditors of the estate, they cannot, for that reason, insist on a sale of the real estate; they are affected by the stay-law equally with the debtors.¶

There must be Notice to the Parties interested in the Real Estate.—Since at common law, and in all of those American States in which no contrary rule has been enacted by statute,**

The State v. Conover, 9 N. J. L., 338; Foley v. McDonald, 46 Miss., 238, 245; Hollman v. Bennett, 44 Miss., 322, 330; Carlton v. Beyers, 70 N. C., 691; Bland v. Hartsoe, 65 N. C., 204, 205; Buford v. McKee, 3 B. Mon., 224, 226. In Indiana the real estate was ordered sold to pay creditors upon the death and insolvency of the administrator *de bonis non*, who had wasted the estate, and his surety: Nettleton v. Dixon, 2 Ind., 446, 448.

* Evans v. Fisher, 40 Miss., 643, 674 (Harris, J., dissenting, on the ground that if the assets were originally sufficient, the lands descend to the heirs discharged of any liability for debts: p. 678 *et seq.*); Merritt v. Merritt, *supra*; Faran v. Robinson, 17 Ohio St., 242, 252 (ordering a sale on petition of the administrator after final settlement and partition of the land among the heirs).

† King v. Kent, 29 Ala., 542, 550.

‡ In chancery; and the order can only be made at the instance of one interested in the personal as well as the real estate, and without prejudice to creditors. The widow in such case may have dower, but no share in the personalty saved: Waring v. Waring, 2 Bland, 673.

§ Rev. Stats., 1879, sect. 161; but in such case, the widow takes only so much as she would have been entitled to if the debts had been paid out of the personalty: Rev. Stats., sec. 251.

|| In this State it is held that an appellate court will not interfere with the Surrogate's discretion on such order: Moore v. Moore, 14 Barb., 27, 30.

¶ Elliott v. George, 23 Gratt., 780.

** As to which, see *ante*, p. 638.

the real estate descends at once, upon the death of the ancestor or testator, to the heir or devisee, and the personal estate is the primary fund liable to debts, the executor or administrator is not, in a proper or full sense, the representative of the heirs or devisees in a proceeding to subject the real estate to the payment of debts. He holds the personalty for the primary purpose of paying the debts; hence, as to the question of the liability of the real estate, which is held, not by him, but by the heirs, his *status* is in this respect antagonistic to that of the heirs;* and it follows that a judgment in favor of creditors against him is not necessarily binding upon the heirs, so far as their interest in the real estate is concerned.† Hence, before there can be a valid order divesting them of their title by a sale for the payment of debts, they must have an opportunity to be heard and to contest, not only the necessity or propriety of the sale, but also the validity and justice of the debts for the payment of which the sale is demanded. There can be, therefore, no valid order, decree, or license for the sale of real estate to pay debts without notice to the heirs or parties concerned, in some form, either actual or by publication.‡ It is not inconsistent with this principle, that in some of the States the subjection of real estate in probate courts to the payment of debts is said to be *in rem*, binding upon all parties claiming under the decedent, without special notice to them, analogous to the doctrine applied in admiralty with respect to prize property, or in common-law courts, to property seized under attachment; in such cases the executor or administrator represents the land, and its defence devolves upon him. Nor does the judgment rendered in such proceeding protect the administrator against liability to the heir if he had no notice, but only the purchaser who has acted in good faith.§ Notice to heirs or devisees of devised lands

* *Anderson v. Levy*, 33 Ark., 665, 676.

† *Nichols v. Day*, 32 N. H., 133.

‡ *Hopkins v. Van Valkenburg*, 16 Hun., 3, 4 *et seq.*; *Sample v. Barr*, 25 Penn. Stat., 457, 459; *Bienvenu v. Parker*, 30 La. An., 160; *Ferguson v. Scott*, 49 Miss., 450, 505 *et seq.*; *Colson v. Brainard*, 1 Redf., 324, 327.

§ *Rorer on Jud. Sales*, sect. 253; *McPherson v. Cunliff*, 11 Serg. & R., 422, 430 *et seq.*; *Grignon's Lessee v. Astor*, 2 How. (U. S.), 319, 338; *King v. Kent*, 29 Ala., 542, 549; *Satcher v. Satcher*, 41 Ala., 26, 39; *Garrett v. Bruner*, 59 Ala., 513, 515; *Lynch v. Baxter*, 4 Texas, 431, 437; *Robb v. Irwin*, 15 Ohio, 689, 698; *Beauregard v. New Orleans*, 18 How. (U. S.), 497, 503.

is held necessary in Alabama,* Arkansas,† California,‡ Florida,§ Georgia,|| Illinois,¶ Indiana,** Iowa,†† Kansas,‡‡ Louisiana,§§ Massachusetts,|||| Mississippi,¶¶ Missouri,*** New Hampshire,†††

* *Williams v. Williams*, 49 Ala., 439; *Spragins v. Taylor*, 48 Ala., 520.

† *Rogers v. Wilson*, 13 Ark., 507, 509.

‡ *Townsend v. Tallant*, 33 Cal., 45, 51.

§ *Price v. Winter*, 15 Fla., 66, 104 (holding appearance of the statutory guardian of a minor sufficient).

|| *Davis v. McDaniel*, 47 Ga., 195, 206; *Davis v. Howard*, 56 Ga., 430, 433.

¶ *Marshall v. Rose*, 86 Ill., 374; *Harris v. Lester*, 80 Ill., 307; *Gibson v. Ball*, 30 Ill., 172. Where the return of the officer as to service of the notice contradicts the finding of the court, the want of service appearing from the return will overcome the presumption arising from the finding, and prove want of jurisdiction, even in a collateral proceeding: *Barnett v. Wolf*, 70 Ill., 76. In Illinois it has also been held proper for the heir to join with the administrator in the petition, although they are not in privity, because the heir, who is not bound by the admissions of the administrator, may thus bind himself: *Hopkins v. McCann*, 19 Ill., 113. Where a posthumous heir was born, although in another State, and unknown to the parties in Illinois, and who is for that reason not made a party in chancery to enforce creditors' liens against the estate, a sale under such proceedings is void as to the posthumous heir: *McConnell v. Smith*, 39 Ill., 279, 288.

** *Sherry v. Dunn*, 8 Blackf., 542, 552; *Guy v. Pierson*, 21 Ind., 18; *Helme v. Love*, 41 Ind., 210; *Doe v. Anderson*, 5 Ind., 33 (holding that an infant cannot waive service, even by guardian).

†† *Good v. Norley*, 28 Iowa, 188; *Thornton v. Mulquinne*, 12 Iowa, 549.

‡‡ *Johnson v. Clark*, 18 Kan., 157, 168; *Mickel v. Hicks*, 19 Kan., 578.

§§ *Gibson v. Foster*, 2 La. An., 503, 508 (holding a sale void where attorney was appointed to represent an absent heir); *Wright v. Steed*, 10 La. An., 238; in this State notice is held essential, if the estate is solvent, to the heirs and interested parties; if it is insolvent, to the administrator, where the application is by creditors: *Tertron v. Comeau*, 28 La. An., 633.

|||| *Norton v. Norton*, 5 Cush., 524.

¶¶ *Yerger v. Ferguson*, 55 Miss., 190; *Winston v. McLendon*, 43 Miss., 254, 257.

*** *Valley v. Fleming*, 19 Mo., 454 (holding a sale void where it appeared from the record that the notice could not have been given), 461; but in Missouri the probate court may of its own motion order the real estate to be sold if it appears, upon an annual settlement, necessary to pay the debts: *Rev. Stats.*, sec. 170; and in such case no notice to the heirs is necessary; *Patee v. Mowrie*, 51 Mo., 160, 164.

††† *French v. Hoyt*, 6 N. H., 370; *Merrill v. Harris*, 26 N. H., 143, 147.

New Jersey,* New York,† Ohio,‡ Oregon,§ Pennsylvania,|| Tennessee,¶ Texas,** and Wisconsin.†† Notice is held not necessary in Missouri, if the sale is ordered *ex mero motu* by the court in passing upon an annual settlement.‡‡ In Louisiana, it seems that a sale may be ordered on motion of creditors, without notice to heirs, and without petition of the administrator;§§ but there must be notice to the administrator.|||| In Indiana the petition may be filed in vacation and the notice to heirs issued by the clerk without special order of the court.¶¶ It has been held that creditors are not entitled to notice,*** and cannot appeal from a refusal of the license.††† Where an order of sale has been obtained and fully complied with, it is held in some States, that no new order for the sale of additional real estate can be made at a subsequent term without new notice.‡‡‡

Who may Appear, and What may be Shown against the Order to Sell.—The office of the notice is to give to the heirs and other persons in interest, a full opportunity to be heard, and to offer evidence upon the justice or policy of ordering the sale. Hence the application must be heard at the time or term which is specified in the notice, whether the notice is by actual service

* McDonald v. Hutton, 8 N. J. Eq., 473, 474.

† Farrington v. King, 1 Bradf., 182; Corwin v. Merritt, 3 Barb., 341, and authorities, 345. The Surrogate cannot shorten the time for showing cause: Havens v. Sherman, 42 Barb., 636, 639.

‡ Calkin v. Johnson, 20 Ohio St., 539, 547 (reciting the statute providing for the notice); but if the minor children, not named in the petition, actually have an appearance entered for them in court, by their guardian, pending the petition, they are bound by the order of sale: Ewing v. Highby, 7 Ohio, pt. 1, p. 198; Ewing v. Ewing, 7 Ohio, pt. 2, p. 138.

§ Fiske v. Kellogg, 3 Oreg., 503. || Dean's Appeal, 87 Penn. Stat., 24.

¶ Trafford v. Young, 3 Tenn. Ch. 496; Taylor v. Walker, 1 Heisk., 734.

** Finch v. Edmonson, 9 Texas, 504, 513.

†† Gibbs v. Shaw, 17 Wis., 204, 208; Blodgett v. Hitt, 29 Wis., 169, 176.

‡‡ Patee v. Mowrie, 51 Mo., 160, 164.

§§ Dubuch v. Wildermuth, 3 La. An., 407; Tertron v. Comeau, 28 La. An., 633, 634; Carter v. McManus, 15 La. An., 676.

|||| Succession of Spears, 28 La. An., 804.

¶¶ Shephard v. Fisher, 17 Ind., 229, 230.

*** Thompson v. Cox, 8 Jones L., 311, 313.

††† Palmer v. Williamson, 13 Gray, 336.

‡‡‡ Cromine v. Thorp, 42 Ill., 120, 122.

upon the parties, or by publication; if heard at any other time, the proceeding will be held to be without notice.* On the hearing or trial of the motion or application, the heirs, or any other person interested in the real estate which may be affected by the sale, may appear, and make themselves parties if necessary, to oppose the order of sale, and if unsuccessful in the probate court, they may appeal from its decision.†

It may be shown, in the defence against the contemplated order, that claims were unjustly or improperly allowed, or that they are barred by the general or special statute of limitations, or that any other legal or equitable ground exists why the land should not be sold; for, it must be remembered,‡ that the parties affected by the sale of the real estate were not parties to the judgment against the executor or administrator in the matter of allowing claims of creditors.§ But the validity of the appointment of the

* *Turney v. Turney*, 24 Ill., 625; *Morris v. Hogle*, 37 Ill., 150, 154; *Schnell v. Chicago*, 38 Ill., 382, 391; *Foley v. McDonald*, 46 Miss. 238, 244, and *Hendricks v. Pugh*, 57 Miss., 157 (both holding service of process after its return-day insufficient). It is held in Illinois, that it is the duty of the person notified to be present in court at the specified time; and if the party giving the notice does not appear, the party having received the notice may take a rule upon the other to proceed, or on failure, have the proceedings dismissed; but if this is not done, the administrator is not restricted to the day named in the notice, but may present his application on another day of the term: *Shoemate v. Lockridge*, 53 Ill., 503, 506; but it is not necessary to name a particular day in the notice by publication; the naming of the term is sufficient: *Goudy v. Hall*, 36 Ill., 313; *Finch v. Sink*, 46 Ill., 169, 171.

† *Ex parte Marr*, 12 Ark., 84; *Paine v. Pendleton*, 32 Miss., 320, 322; *Richardson v. Judah*, 2 Bradford, 157; *Gibson v. Pitts*, 69 N. C., 155.

‡ See *ante*, p. 651.

§ *Callahan v. Griswold*, 9 Mo., 784, 792; *Casey v. Murphy*, 7 Mo. App., 247; *Beckett v. Selover*, 7 Cal., 215, 220. It should be observed that this decision was rendered before the statute put administrators in charge of real as well as of personal property: *Mooers v. White*, 6 Johns. Ch., 360; *Campbell v. Renwick*, 2 Bradf., 80; *Colson v. Brainard*, 1 Redf., 324; *Renwick v. Renwick*, 1 Bradf., 234 (holding that although only some of any greater number of heirs may make objection, if shown to be valid it must affect all, 241); *Bienvenu v. Parker*, 30 La. An., 160 (holding that heirs may enjoin a sale where the judgment, to satisfy which the order of sale was made, was obtained without citation to the party defendant. But an unliquidated demand against a creditor cannot be set up against his right to have the real estate sold to pay a debt to him for which he has judgment: *Brown v. Roberts*, 21 La. An., 508; *Dean's Appeal*, 87 Penn. Stat., 24.

administrator cannot be questioned on such hearing.* And if the heirs, or any of them, will give bond for the payment of the debts, and to hold the administrator harmless, no order or license for the sale of the real estate will be granted.† So, an agreement by the older children of a decedent to account to the administrator for advancements made to them in the decedent's lifetime, in order to enable the administrator to pay the debts and exonerate the land, will be enforced.‡

The title of the deceased to the real estate cannot be passed upon on such application;§ nor collateral questions of trespass, boundary, etc.|| But if it appear that the title is controverted, and that by reason thereof the sale will be made under disadvantageous circumstances, it is proper to stay proceedings until the title may be ascertained in a court of competent jurisdiction;¶ and where it appears that the interest of the deceased was a life-estate, the petition should be dismissed.** Where an executor or administrator is proceeding in the sale of real estate, the title to which is claimed by another, injunction is the proper remedy;†† but a court of equity will not interfere with the discretion vested in the probate court in cases of mere doubt.‡‡

* *Riser v. Snoddy*, 7 Ind., 442; *Carnan v. Turner*, 6 Har. & J., 65, 67.

† *Jenness v. Robinson*, 10 N. H., 215, 218. Such a bond is valid, though executed after the order, if the executor forbear to sell: *Davison v. Burgess*, 31 Ohio Stat., 78. And the condition of the bond is not broken until it is shown that the personalty is insufficient to pay a debt found due: *Studley v. Josselyn*, 5 Allen, 118.

‡ *Smith v. Axtell*, 1 N. J. Eq., 494, 500.

§ *Shields v. Ashley*, 16 Mo., 471, 473; *Hewitt v. Hewitt*, 3 Bradf., 265; *Succession of Renneberg*, 15 La. An., 661; *Kline's Appeal*, 39 Penn. Stat., 463, 469 (holding that since the court can order the sale of the deceased's interest in the land only, it is not error to confirm a sale against the widow's remonstrance on the ground that she claims a resulting trust in the land). But in Indiana, where probate jurisdiction is conferred upon the common pleas courts, an issue may be formed and tried upon the application for the sale of the real estate, as to the ownership of the same; and the judgment was held conclusive against the heir: *Gavin v. Graydon*, 41 Ind., 559, 563.

|| *Clements v. Foster*, 71 N. C., 36.

¶ *Trent v. Trent*, 24 Mo., 307, 311; *Hewitt v. Hewitt*, 3 Bradf., 265; *Vallé v. Bryan*, 19 Mo., 423, 424; *Homer's Appeal*, 55 Penna. Stat., 337, 340; *Thayer v. Lane*, Harr. (Mich.), 247, 253.

** *Grim's Appeal*, 1 Grant Cas., 209, 211.

†† *Fisk v. Wilson*, 15 Texas, 430, 432. ‡‡ *Sprague v. West*, 127 Mass. 471.

(4.) *Within what Time the Application may be Made.*—The necessity of a prompt and speedy settlement of the estates of deceased persons, as well as the justice of putting heirs and devisees in the indisputable possession of their inheritance as early as a proper regard for the rights of creditors will admit, requires a limitation upon the time when either the creditors or the executor or administrator may apply for the subjection of real estate to the payment of debts. When gross neglect or palpable laches in this respect is apparent, the application will be refused. That in the absence of statutory regulation it is the duty of the court before which the application is pending to determine what shall be considered a reasonable time, is recognized by all the authorities. Courts have found this point not without difficulty,* and no precise rule, to be inflexibly followed, has been anywhere laid down.

Chancellor Kent suggested one year after the executor or administrator entered upon the duties of his office, as a reasonable limit to the time, but is careful to add, "unless under peculiar circumstances, and with some reasonable cause for delay."† Justice Story, upon mature consideration of this question, reached the conclusion that the statute of limitations furnished an analogy which might be safely followed, and accordingly held that no application should be entertained to subject real estate to the payment of debts after the period which would bar the right of entry on lands.‡ The analogy of the statute of limitations was adopted

* "Reflection and experience both," says Ewing, C. J., in *Liddell v. McVicker*, 6 N. J. L., 44, 56, "teach the extreme difficulty of prescribing any fixed rule which would in general operate safely and justly. The lesson is more impressively taught by the very wide conclusions to which enlightened courts have been led. The time, reasonable according to the situation of one estate, would in another be very unreasonable." Quoted with approbation by Lawrence, J., in *Rosenthal v. Renick*, 44 Ill., 203, 205.

† *Mooers v. White*, 6 Johns. Ch., 360, 378. "What is reasonable time? may be another question. All I mean at present to say is, that the judge of probate or surrogate must be entitled to determine, in sound discretion, what is a reasonable time, under the circumstances of the case, and to determine when the executor did first discover, or had any ground to suspect the insufficiency of the personal estate; and whether, *as soon as conveniently might have been*, he made out an account, and filed an inventory, and applied the assets in hand according to the requisitions of the statute." *Id.*, 376.

‡ In the thoroughly considered case of *Ricard v. Williams*, 7 Wheat., 59, 115 *et seq.*, argued on the one side by Pinkney, and on the other by Ogden and

in Connecticut,* Illinois,† Indiana,‡ Iowa,§ Maine,|| Massachusetts,¶ Michigan,** Mississippi,†† and New Hampshire.‡‡ The statute of limitations applied in these States is not the general statute, but the special statute, requiring claims against the estate of a deceased person to be proved within a certain time after grant of letters. In each of the cases cited the court intimated that particular circumstances would prevent the application of the rule.

Webster. He cited *Gore v. Brazier*, 3 Mass., 523, 542; *Wyman v. Bridgen*, 4 Mass., 150, 155; *Sumner v. Child*, 2 Conn., 607, as holding a similar doctrine.

* *Sumner v. Child*, *supra*.

† *McCoy v. Morrow*, 18 Ill., 519, 523; *Wolf v. Ogden*, 66 Ill., 224, 225 (adopting the analogous principle of limitation for the recovery of lands seven years from the death of the intestate). In *Dorman v. Lane*, 1 Gilm., 143, 148, the court held that no application would be granted after the expiration of one year after final settlement of the estate in the probate court. See, also, *Moore v. Ellsworth*, 51 Ill., 308, 310; *Bursen v. Goodspeed*, 60 Ill., 277; *DuBois v. McLean*, 4 McLean, 486, 489; *Reed v. Colby*, 89 Ill., 104, 107. And where a mortgage is foreclosed against the heirs and personal representative of a decedent, it is error to decree the payment of any deficiency in the proceeds of sale against the administrator, unless the claim was presented within the special limitation in favor of administrators (two years after the grant of letters): *Mulvey v. Johnson*, 90 Ill., 457, 459.

‡ *Nettleton v. Dixon*, 2 Ind., 446.

§ *McCrary v. Tasker*, 41 Iowa, 255, 260; *Waters v. Crassen*, 41 Iowa, 261, 262. In Iowa claims against decedent's estate must be proved within eighteen months, after which time they are barred.

|| *Smith v. Dutton*, 16 Me., 308, 312; *Nowell v. Nowell*, 8 Greenl., 220. In Maine the statute of limitations in favor of administrators is four years.

¶ *Ex parte Allen*, 15 Mass., 57; *Heath v. Wells*, 5 Pick., 140, 143; *Palmer v. Palmer*, 13 Gray, 326. In Massachusetts the period of limitation in favor of administrators was formerly four, but is now two years: Gen. Stats., 1860, p. 491, sect. 5. Real estate may, however, be ordered to be sold for the payment of debts not accruing within two years from the date of letters, or within a year from the determination of a litigated claim: Supp., 1872, p. 895, ch. 238. Hence, where an estate was represented insolvent before the expiration of two years from the giving of the bond, and the debt was proved before the commissioners of insolvency within the two years, the real estate was properly ordered to be sold for its payment: *Edmunds v. Rockwell*, 125 Mass., 363. But a sale is void where the debt has not been proved within two years: *Tarbell v. Parker*, 106 Mass., 347.

** *Estate of Godfrey*, 4 Mich., 308, 312.

†† *Ferguson v. Scott*, 49 Miss., 400, 409.

‡‡ *Hall v. Woodman*, 49 N. H., 295, 304. In New Hampshire claims cannot be proved against an estate after the expiration of three years.

So, it was held in Illinois that nine years,* and in another case thirteen years,† if the delay was satisfactorily explained, was not an unreasonable time within which to grant the application. In New York the statute bars application after the expiration of three years from the grant of letters;‡ and no real estate of a deceased person, the title to which has passed out of the heir or devisee by conveyance or otherwise to a purchaser in good faith for value, can be sold to pay debts, if administration has not been applied for within four years after his death.§ In Pennsylvania, debts of a deceased person continue to be liens against his real estate for five years after his death, except as to mortgages or judgments, which are not thus limited, and, if not enforced within that time, the real estate vests absolutely in the heirs. || In Rhode Island, courts of probate may authorize the sale of a decedent's real estate for his debts at any time, while it remains in the hands of his heirs. ¶ In Kentucky, a creditor, who delayed to enforce his claims while the executor was wasting the assets, or who released the executor, was held to have no claim against the real estate of the heirs.** In California, in a case in which seventeen years' delay was held to amount to laches, on account of which the order to sell made by the probate court was reversed, it was suggested, but not decided, that the statutory limitation to "a special proceeding of a civil nature" was applicable. ††

An efficient and simple rule in this respect suggests itself in those States which require the claims of creditors in all cases to be adjusted in the probate court, as, for instance, in Missouri. It results quite naturally from the requirement to present the

* *Moore v. Ellsworth*, 51 Ill., 308, 310.

† *Bursen v. Goodspeed*, 60 Ill., 277.

‡ *Slocum v. English*, 62 N. Y., 494, 497. As to adjudications before this statute, see *Skidmore v. Romaine*, 2 Bradf., 122; *Hyde v. Tanner*, 1 Barb., 75, 79 *et seq.*; *Fitch v. Witbeck*, 2 Barb. Ch., 161; *Ferguson v. Broome*, 1 Bradf., 10; *Jackson v. Robinson*, 4 Wend., 436.

§ *Parkinson v. Jacobson*, 18 Hun., 353, 354.

|| *Bindley's Appeal*, 69 Penn. Stat., 295, 298.

¶ *Mowry v. Robinson*, 12 R. I., 152.

** *Buford v. McKee*, 3 B. Mon., 224, 228.

†† *Estate of Crosby*, 55 Cal., 574, 587.

claims to the probate court for allowance or classification before they have any standing in a court of equity.* The special limitation in favor of administrators in Missouri is two years, and, as it is the duty of the administrator, *virtute officii*, to interpose the plea of this statute,† although he may, perhaps, waive the general statute of limitations,‡ it will readily be seen that, with the exception of those demands which accrue after the death of the testator or intestate, no debts can be proved against an estate after the close of the second year of administration,§ and hence there can be no liability of the real estate to pay them. But if debts have been proved within the two years, exceeding the value of the personal assets on hand, the question of the sale of real estate rests between the creditors, the administrator, and the heirs, so that either of them may at any time insist upon the sale, or, as we have seen,|| the probate court itself may of its own motion order the sale, unless a postponement be found conducive to the interests of all the parties concerned. This furnishes a practical solution of the question. If the administration is permitted to be closed without proving the debts, there can be no liability of the real estate subsequently, because no debts can be subsequently established, and justice is done alike to the creditor, who has no one but himself to blame if he fails to subject the real estate within the proper time, and the heir, who may then enter upon the enjoyment of his inheritance, and improve it without fear of losing both improvement and land, or sell it without depreciation of its value by a cloud upon the title which he can give.¶

(5.) *What must be Alleged in the Petition.*—We have seen** that the insufficiency of the personal assets to pay the debts must clearly appear. This should be set forth in the petition.†† To this

* *Pearce v. Calhoun*, 59 Mo., 271, 274.

† *Wiggins v. Lovering*, 9 Mo., 259, 263.

‡ *Ibid.*

§ *Doerge v. Hiemenz*, 1 Mo. App., 238, 240.

|| *Ante*, p. 653, note 7.

¶ *Titterington v. Hooker*, 58 Mo., 593, 596 *et seq.*; *Pearce v. Calhoun*, 59 Mo., 271, 274; *Public Works v. Columbia College*, 17 Wall., 521, 530 *et seq.*

** *Ante*, p. 649.

†† *Small v. Cromwell*, Hill & D. Supp., 154, 155; *Gregory v. McPherson*, 13 Cal., 582, 576 *et seq.* (holding the sale void in a collateral proceeding, because the petition did not show the amount of the personal property); *Estate of Bolland*, 55 Cal., 310, 315; *Wattles v. Hyde*, 9 Conn., 10 (holding the sale void

end the petition must contain a detailed account of the personal estate on hand, and a list of the debts which are proved.* The personal property should not be reckoned at its highest or nominal value, but at such sum as it will probably yield to the estate, and the amount of the outstanding claims should be reckoned at the amount which may probably be collected thereon.† In some of the States the debts or claims of creditors must first be adjudicated or allowed, before an order for the real estate can be based thereon;‡

for the same reason); *Frazier v. Pankey*, 1 Swan, 75, 79 (a bill in chancery, upon which the court refused an order of sale because there was no finding of the insufficiency of personal assets).

* *Ford v. Walsworth*, 15 Wend., 449, 450; *Atkins v. Bostwick*, 20 Wend., 241; *Van Nostrand v. Wright*, Hill & D. Supp., 260, 262; *Crippen v. Crippen*, 1 Head, 128; *Rapp v. Matthews*, 35 Ind., 332, 338; *The State v. Probate Court*, 19 Minn., 117, 120, and *Collins v. Farnsworth*, 8 Blackf., 575 (the latter two cases holding that the debts may be stated in the aggregate); *Bree v. Bree*, 51 Ill., 367 (holding the allegation that the decedent left no personal property, sufficient on this point); *Gregory v. Faber*, 19 Cal., 397 (holding an account of the personal property filed with but not made part of the petition, to be insufficient: 409); *Mount v. Vallé*, 19 Mo., 621 (holding that in a collateral proceeding the failure to file the lists and accounts is not fatal: 623); *Grayson v. Weddle*, 63 Mo., 523, 536 (holding that where a creditor desires the sale, he may compel the administrator to file the lists and accounts, and if the heirs take no appeal, they are concluded by the finding of the probate court); *Bray v. Neill*, 21 N. J. Eq., 343 (holding a reference to the general inventory of personal property, filed in another State, insufficient); *Richmond v. Foote*, 3 Lans., 244 (holding reference to the general inventory-sufficient: 252); *Reynolds v. Schmidt*, 20 Wis., 374 (holding that the omission to state the value of the personal property is not fatal in a collateral proceeding); *Bostwick v. Skinner*, 80 Ill., 147, 157 (holding that the recital that the administrator filed an inventory and appraisal, which "were cancelled so far as they related to goods and chattels, as said goods and chattels never came into the hands or possession of said administrator, for which reason no sale could be had, or sale-bill rendered of said goods and chattels," was sufficient).

† *Bridge v. Swayne*, 3 Redf., 487, 490.

‡ *Cralle v. Meem*, 8 Gratt., 496 (being a suit in the Circuit Court to marshal assets); *Sandford v. Granger*, 12 Barb., 392, 402; *Colson v. Brainard*, 1 Redf., 324, 329; *Rozier v. Fagan*, 46 Ill., 404 (holding an act of the legislature, which authorizes the sale of real estate to pay debts, without providing for judicial proceeding to ascertain whether debts are due, is unconstitutional); *Lane v. Dorman*, 3 Scam., 233, 242; *Walker v. Diehl*, 79 Ill., 473, 475; *Sample v. Barr*, 25 Penn. Stat., 457, 459; *Starkey v. Hammer*, 1 Baxt., 438; *Linnville v. Darby*, 1 Baxt., 306, 310; *Tarbell v. Parker*, 106 Mass., 347, 349; *Kent v. Waters*, 18 Md., 53; *Carey v. Dennis*, 13 Md., 1 (holding that the existence of the debt during the lifetime of the decedent must be shown, although not then payable).

but in others this is not required,* or the allowance may be made at the time of the application, or entered subsequently.† The allowance of a debt against the same decedent, in another State, against an administrator there, is not sufficient.‡ Nor is the averment in the petition that the debt is due, and the oral admission of the administrator, sufficient in a hearing on the petition.§

The real estate of the decedent must be described, and that portion, which is intended to be sold, must be particularly identified.||

* *Smith v. Smith*, 27 N. J. Eq., 443 (except in insolvent estates: 446); *Tenney v. Poor*, 14 Gray, 600; *Maeck v. Sinclair*, 10 Vt., 103; *Barnett v. Kincaid*, 2 Lans., 320, 323; *Ex parte Glenn*, 2 Redf., 75.

† *Farrington v. King*, 1 Bradf., 182, 191; *Little v. Sinnett*, 7 Iowa, 324, 333; *Grayson v. Weddle*, 63 Mo., 523, 537.

‡ *Hobson v. Payne*, 45 Ill., 158.

§ *Chamberlin v. Chamberlin*, 4 Allen, 184.

|| *Frazier v. Steenrod*, 7 Iowa, 339, 346; *Weed v. Edmonds*, 4 Ind., 468, 470; *Williams v. Childress*, 25 Miss., 78, 82; *Schnell v. Chicago*, 38 Ill., 382 (holding that a variance between the petition and the description of the land in subsequent proceedings, capable of being corrected from the papers themselves, is not fatal); *Monk v. Horne*, 38 Miss., 100 (holding that in a collateral proceeding the description of the land as "the land and mills belonging to the estate of Thomas Monk, decd.," is sufficient); *Clements v. Henderson*, 4 Ga., 148, and *Davie v. McDaniel*, 47 Ga., 195, 205 (both to the same effect as *Monk v. Horne*, *supra*); *Pittinger v. Pittinger*, 3 N. J. Eq., 156 (holding general description bad in a direct, but sufficient in a collateral proceeding); *Lamkin v. Reese*, 7 Ala., 170 (holding that a misdescription of the land, if it did not mislead the purchaser, may be corrected without recourse to equity); *Smith v. Flournoy*, 47 Ala., 345, 360 (sustaining a sale on a motion to set same aside, although the description was imperfect, but true so far as it went, and which might have been amended in the probate court, or perfected by the aid of facts judicially known to the court). To the same effect: *Money v. Turnipseed*, 50 Ala., 499, 500; *Townsend v. Gordon*, 19 Cal., 188, 207 (holding a reference to the general inventory insufficient); *Smith's Estate*, 51 Cal., 563, 565 (holding that in addition to the description a statement of the condition of the land is necessary, and that the statutory power to supply a defect in the petition is applicable in collateral proceedings only); *McNitt v. Turner*, 16 Wall., 352; *Moffit v. Moffit*, 69 Ill., 641; *Lasure v. Carter*, 5 Ind., 498 (permitting correction of the description of the land by the appraisers); *Graham v. Hawkins*, 38 Texas, 628; *Succession of Boudreaux*, 6 La. An., 78 (holding the description as "all the succession's right, title, and interest in certain land described in the inventory, and all its right against A. for money received," fatally defective, as a fraud on the purchaser, if there be no rights of the succession, and as injurious to the minor heirs); *Blythe v. Hoots*, 72 N. C., 575; *Bryan v. Bauder*, 23 Kan., 95 (holding the statement that "the land is situated in Miami County," suf-

In some States it is required that the names of the heirs and devisees, their ages, and, if married females, the names and ages of their husbands, be fully set out.*

(6.) *Guardians ad litem for Infant Heirs*.—If there are infant heirs whose property it is sought to subject to sale for the debts of the ancestor, the appointment of a guardian *ad litem* is in some States a necessary prerequisite, who may make any defence against the order to sell that an adult heir could make. Such appointment is held essential in Alabama,† Illinois,‡ Indiana,§ Iowa,||

ficient in a collateral proceeding); *Davis v. Touchstone*, 45 Texas, 490, 497 (holding the requirement that the order of sale must describe the lands to be sold, directory, and citing *Wells v. Polk*, 36 Texas, 121, and *Wells v. Mills*, 22 Texas, 302).

* *Griffin v. Griffin*, 3 Ala., 623; *Cloud v. Barton*, 14 Ala., 347, 349; *Page v. Matthews*, 41 Ala., 719, 720; *Guy v. Pierson*, 21 Ind., 18, 21; *Turney v. Turney*, 24 Ill., 625, 626.

† *Craig v. McGehee*, 16 Ala., 41, 49; *Johnson v. Johnson*, 40 Ala., 247.

‡ *Whitney v. Porter*, 23 Ill., 445. In Illinois, the waiver of summons in behalf of an infant heir confers no jurisdiction, and a sale based upon the admission of the guardian avoids the sale even in a collateral proceeding: *Clark v. Thompson*, 47 Ill., 25, 26; *Herdman v. Short*, 18 Ill., 59, 60. Nor is the answer of the guardian *ad litem* sufficient to support the order of sale; the court must hear proof, and this must appear of record: *Fridley v. Murphy*, 25 Ill., 146. In *Botsford v. O'Connor*, 57 Ill., 72, it was decided that if jurisdiction is obtained as to part of the heirs, and not as to an infant, the sale is good as to those properly in court, and void only as to the infant; see separate opinion of Scott and Sheldon, JJ., p. 80 *et seq.* Nor does the failure of a guardian *ad litem* to file his answer take away the power of the court to pronounce its decree over the interest of the infant, if there was proper notice: *Goudy v. Hall*, 36 Ill., 313, 318. In a later case, it is held that where there was notice by publication, under the statute, the failure to appoint a guardian *ad litem* for an infant heir might be error, but does not defeat the validity of a sale in a collateral proceeding: *Gage v. Schroder*, 73 Ill., 44; *Gibson v. Roll*, 27 Ill., 88; *Stow v. Kimball*, 28 Ill., 93.

§ In Indiana, it is error to base an order of sale upon the admission of the guardian *ad litem*, but does not avoid the sale: *Thompson v. Doe*, 8 Blackf., 336, 337. The record should affirmatively show notice to the minor heirs, and that evidence was heard in support of the allegations: *Martin v. Stow*, 7 Ind., 224; *Doe v. Anderson*, 5 Ind., 33, 35; *Guy v. Pierson*, 21 Ind., 18, 21; *Timmons v. Timmons*, 3 Ind., 251; s. c. 6 Ind., 8.

|| The Supreme Court of Iowa were equally divided upon the question whether the appearance of an infant by his guardian *ad litem* was sufficient to confer jurisdiction without personal service, and so sustained the affirmative decision of the court below: *Good v. Norley*, 28 Iowa, 188.

New York,* North Carolina,† Ohio,‡ and Virginia.§ In other States such appointment is not necessary, the proceedings are valid without, in direct as well as in collateral proceedings. It has been so held in Kansas,|| Massachusetts,¶ Missouri,** New Hampshire,†† and Wisconsin.‡‡

(7.) *Of the Bond and Oath required of the Executor and Administrator before the Sale.*—Since real estate is not assets in the hands of the executor or administrator until it appears that the personal estate is insufficient to pay the debts or legacies,§§ it is held in some States that the conditions of the original administration-bond do not include the real estate, so that the sureties on such bond are not liable for the loss or misapplication of the funds arising from the sale of lands.|||| Hence it is necessary that an

* In this State, the guardian *ad litem* must be appointed six weeks before the hearing of the application: *Sheldon v. Wright*, 7 Barb., 39, 43. A sale is void as to infant heirs for whom no guardian has been appointed: *Bloom v. Burdick*, 1 Hill (N. Y.), 130; *Schneider v. McFarland*, 2 Comst., 459; s. c. 4 Barb., 139; *Havens v. Sherman*, 42 Barb., 636; *Corwin v. Merritt*, 3 Barb., 341.

† The appointment cannot be made before the return of the summons; an earlier appointment vitiates the sale as to the infants: *Hyman v. Jarnigan*, 65 N. C., 96, 98.

‡ The appointment of a guardian *ad litem* who appeared and answered for infant heirs, is sufficient in this State to support a sale in a collateral suit: *Robb v. Irwin*, 15 Ohio, 689 (Reed, J., dissenting, 704); *Lewis v. Lewis*, 15 Ohio, 715. And where they appear by their general guardian, upon whom alone citation had been served, it is sufficient: *Ewing v. Ewing*, 7 Ohio, pt. 2, p. 138. And see *Sheldon v. Newton*, 3 Ohio Stat., 494, 498 *et seq.*, for an exhaustive review of the law of Ohio on this point.

§ The statute of Virginia requires all to be made parties who would be heirs or distributees of the infant if it were dead; and it was held that a child *in ventre sa mère* possessed no such interest in the real estate of which its father died seised as could affect the power of a court to convert it into personalty; and the proceeding to sell such property was held valid, although the posthumous child had not been made a party: *Knotts v. Stearns*, 4 Otto, 638, 640.

|| *Fudge v. Fudge*, 23 Kan., 416, 420. ¶ *Holmes v. Beal*, 9 Cush., 223, 226.

** *Overton v. Woodson*, 17 Mo., 442, 452.

†† *Boody v. Emerson*, 17 N. H., 577, 579.

‡‡ *Sitzman v. Pacquette*, 13 Wis., 291, 320.

§§ *Ante*, p. 636.

|||| *Strother v. Hull*, 23 Gratt., 652, 668; *Murphy v. Carter*, 23 Gratt., 477, 482 *et seq.*; *Rucker v. Dyer*, 44 Miss., 591, 605; *Warwick v. The State*, 5 Ind., 350, 352; *Nelson v. Jaques*, 1 Me., 139 (in which it is said that the conditions of the bond refer expressly to the personal estate. It would therefore seem *aliter* if the conditions included *all assets*).

additional bond be given in contemplation of the sale of real estate; and, where this is required by statute and neglected, the sale is generally held void. So, in Indiana,* Maine,† Michigan,‡ Minnesota,§ Mississippi,|| Pennsylvania,¶ and Texas.** In other States the statute does not make it obligatory to file a new bond in contemplation of a sale of real estate; and in such case there is but little doubt that the original administration-bond, if conditioned to faithfully administer the estate, is sufficient to cover and protect the assets arising out of the sale. But, whether required by statute or not, it is clearly the duty of the probate judge to inquire into the sufficiency of the bond, as to its amount, and the solvency of the sureties, and to require an additional bond in such amount as will raise the penalty to at least double the value of the assets in the administrator's hands, and the estimated proceeds from the sale. The order of sale should be refused unless such bond be given.††

* But in this State the sale will not be avoided, where it was made in good faith, and the heirs neglect to offer to repay the purchase-money: *Foster v. Birch*, 14 Ind., 445, 447.

† *Moody v. Moody*, 11 Me., 247.

‡ *Woods v. Monroe*, 17 Mich., 238 (see dissenting opinion of Christiancy, J., p. 244); *Stewart v. Bailey*, 28 Mich., 251, 254 (a guardian's sale of his ward's real estate, the Supreme Court holding that the words of the statute, "in case any bond was required," do not invest the probate court with discretion to require bond or not, it appearing from the whole chapter that in every case where the sale of real estate is authorized, a sale-bond is expressly and imperatively required). In this State administrators may be authorized to mortgage the real estate, and are in such case likewise required to give bond, but not to take an additional oath: *Griffin v. Johnson*, 37 Mich., 87, 91. It is not fatal to a sale that no bond has been given, if no more was realized thereby than was necessary to pay off the homestead right: *Drake v. Kinsell*, 38 Mich., 232, 236.

§ *Babcock v. Cobb*, 11 Minn., 347, 352.

|| *Williamson v. Williamson*, 11 Miss., 715 (holding the bond, and in consequence the sale, void because the condition expressed was not in the words required by the statute); *Currie v. Stewart*, 26 Miss., 646, 649; *Washington v. McCaughan*, 34 Miss., 304, 307 *et seq.*; *Hamilton v. Lockhart*, 41 Miss., 460, 479; *Buckner v. Wood*, 45 Miss., 57, 62.

¶ *Thorn's Appeal*, 35 Penn. Stat., 47, 49 (holding it sufficient if the bond were given before the confirmation of the sale).

** In this State the statute requires the administration-bond to be annually renewed. It was decided that if the new bond be given before the confirmation of the sale, although required before the order was made, it is sufficient: *Edwards v. Raguet*, 19 Tex., 164, 166.

†† *Estate of Arguello*, 50 Cal., 308. In Maine a bond, in addition to the

For a similar reason an oath is in some of the States required to be taken by the executor or administrator before selling real estate upon the order of the probate court.*

(8.) *What Interest in or Title to Lands of the Decedent is subject to be Sold for the Payment of Debts.*—(a.) *Of the Decedent's Title in General.*—Any interest in land, whether legal or equitable, in possession or reversion, including inchoate equities, is liable for the debts of the owner, and may, after his death, be sold by his personal representatives, if necessary to obtain the means of their payment: So, it is held that the equity of redemption of a deceased mortgagor or grantor in a deed of trust is liable to be sold by the order of the probate court to pay his debts,† although proceedings upon the mortgage are pending in a common-law court.‡ Land entries paid for, but upon which patents have not

original bond, is required, if, on the ground that a partial sale would diminish the value of the remainder, the sale of more property is asked for than will be needed to pay the debts: *Hasty v. Johnson*, 3 Me., 282.

* *Parker v. Nichols*, 7 Pick., 111, 117; *Cooper v. Sunderland*, 3 Iowa, 114, 137, 138; *Thornton v. Mulquinn*, 12 Iowa, 549, 554; *Babbett v. Doe*, 4 Ind., 355, 359; *Campbell v. Knights*, 26 Me., 224 (holding the sale void where the administrator failed to take the oath); *Foye v. Coe*, 63 Me., 245, 250 (holding the sale valid if the oath was recorded before the trial); *Voorhees v. Jackson*, 10 Pet., 449, 470 (holding a sale in which this and other requirements of the statute had not been complied with, good in a collateral proceeding).

But long acquiescence by the heirs, and other circumstances tending to show the publicity and fairness of the sale, will raise a presumption from which the jury may infer that the oath has been taken: *Gray v. Gardner*, 399, 402.

The verification of the petition will be presumed in a collateral proceeding: *Weed v. Edmonds*, 4 Ind., 468, 470. The verification of non-residence of the heirs, authorizing publication in lieu of personal service, may be made by affidavit, which need not be entitled as in the case, and without caption: *Harris v. Lester*, 80 Ill., 307, 311. And may be made on information and belief: *Row and v. Carroll*, 81 Ill., 224.

† "But the court also had the power, on the application of the administrator or a creditor of the estate, to make a general order for the sale of the real estate for the payment of debts, embracing equities of redemption, and all other interests in lands:" *Jackson v. Magruder*, 51 Mo., 55, 58. To the same effect, *Perkins v. Winter*, 7 Ala., 855, 865; *Jennings v. Jenkins*, 9 Ala., 285, 290; *Peebles v. Watts*, 9 Dana, 102, 103; *Diehl's Appeal*, 33 Penn. Stat., 406, 407; *Sahler v. Signer*, 44 Barb., 606, 614; *Biggs v. Bickel*, 12 Ohio Stat., 49, 59. The heirs, by obtaining a decree for the legal title, cannot defeat the administrator's right to sell the equity of redemption for the payment of the debts: *Wolf v. Robinson*, 20 Mo., 459.

‡ *Fitzsimmon's Appeal*, 40 Penn. Stat., 422, 427.

been obtained,* titles to land which are in fact complete, but imperfect of record,† head-right certificates,‡ final-settlement certificates,§ title-bonds, and executory contracts for the sale of land,|| as well as resulting trusts,¶ are all equitable estates in land, and are liable, as such, to be sold by order of the probate court to pay the debts of the owner's estate. Estates in reversion and remainder are likewise such interests in land as will support a sale by an executor or administrator;** so also, the estate owned by a purchaser at an administrator's sale, who dies after confirmation by the court, but before payment of the purchase-money.††

Preëmption claims descend to the heirs. It is the policy of the preëmption laws to secure to the actual settler, the possession of the public land while the title is in the government, and the right to acquire the title, by perfecting the entry to him, and after his death to his heirs. It is inconsistent with this policy to postpone the right of the heirs to the claims of the ancestor's creditors, and hence a contract to advance money to the administrator, to enable him to procure the patent, and that it be sold to pay debts of the estate, is void.‡‡ Lands entered in the name of an original settler after his death, are not liable for his debts, and a sale of them by an administrator, under the order of the

* *Avery v. Dufrees*, 9 Ohio, 145, 146 *et seq.*

† *Woods v. Monroe*, 17 Mich., 238, 243.

‡ *Soye v. Maverick*, 18 Texas, 100, 101; but the law which prohibits land of deceased soldiers from being sold for their debts, also protects head-right certificates from sale: *Duncan v. Veal*, 49 Texas, 403, 412. And land-certificates fraudulently obtained are not allowed to be sold, and the order of the probate court can confer no title in such case: *Roehl v. Pleasants*, 31 Texas, 45.

§ *Strodes v. Patton*, 1 Brocken, 228; but would not such certificate constitute personal property?

|| *Williams v. Stratton*, 10 Smed. & M., 418, 426; *Baxter v. Robinson*, 11 Michigan, 520, 522; *Prevo v. Walters*, 5 Ill., 35, 38.

¶ As, where land is purchased with the money of the father, and conveyed in the name of the son: *Vallé v. Bryan*, 19 Mo., 423, 425; so the separate estate of a married woman may be sold after her death, by order of the probate court, to pay the debt of her husband, to secure which she had mortgaged her property: *Estate of Marden*, Myrick (Prob. Ct.), 185.

** *Williams v. Ratcliff*, 42 Miss., 145, 154.

†† *Vaughan v. Holmes*, 22 Ala., 593, 595; *Inman v. Gibbs*, 47 Ala., 305, 310.

‡‡ *Cothran v. McCoy*, 33 Ala., 65, 67.

probate court, is void.* But the improvements made by a settler on public lands, constitute chattels real, which go to the administrator, and may be sold by him as personal property,† while the right of preëmption vests in the heirs alone.‡

It is held in some early cases, that lands of which the deceased was actually, not colorably, disseised at the time of his death, cannot be sold by the executor or administrator for the payment of debts.§ This inability to sell was probably due to the common-law rule that sale of land could not be made without livery of seisin, and an administrator could not be in a better position than his intestate. But this rule is abolished in most, probably in all of the States.

Alienation by the Heirs or Devisees.—The liability of real estate for the owner's debts is paramount to the rights of heirs and devisees;|| hence the right to sell for the payment of debts, within the time and under the requirements fixed by law, is not affected by the alienations of the heirs or devisees; the purchaser at such sale from the administrator takes a title superior to that of the purchaser from them.¶

Land Conveyed by the Decedent in Fraud of Creditors.—Whether an executor or administrator is competent or under ob-

* Johnson v. Collins, 12 Ala., 322, 326; Cothran v. McCoy, 33 Ala., 65, 67.

† Pelham v. Wilson, 4 Ark., 289, 293.

‡ Grover v. Hawley, 5 Cal., 485; Dean v. Wade, 8 La. An., 85; Hawkins v. Johnson, 4 Blackf., 21.

§ Thorndike v. Barrett, 2 Me., 312, 318; Poor v. Robinson, 10 Mass., 131, 135.

|| There is, therefore, the same right to sell the property devised by a testator as to sell that descended from an intestate, when necessary for the payment of debts: Shaw v. Nicolay, 30 Mo., 99; Carson v. Walker, 16 Mo., 68, 87; King v. Kent, 29 Ala., 542, 555; Succession of McLean, 12 La. An., 222; Hannum v. Spear, 2 Dall., 191, 192; Greenwalt's Appeal, 37 Penn. Stat., 95, 97.

¶ The State v. Probate Court, 25 Minn., 22; Den v. Hunt, 11 N. J. L., 1; Hall v. Partridge, 10 How. Pr., 188, 191; Horner v. Hasbrouck, 41 Penn. Stat., 169, 179; Smith v. Anderson, 31 Ohio Stat., 144; Clark's Estate, 3 Redf., 225; Prescott v. Walker, 16 N. H., 340; Faran v. Robinson, 17 Ohio St., 242, 253; Seymour v. Seymour, 22 Conn., 272; McCoy v. Morrow, 18 Ill., 519. In Rhode Island it is held that real estate may be sold by an administrator so long as it is in the possession of the heir; and where an heir sold after the filing of a petition in the probate court for the sale to pay debts, it was held that the purchaser took subject to any decree the probate court might make with reference thereto: Mowry v. Robinson, 12 R. I., 152; Draper v. Barnes, 12 R. I., 156.

ligation to sue at law or in equity to set aside a conveyance of his testator or intestate in fraud of creditors, depends upon the provisions of the statutes upon this subject,* or upon the policy adopted by the courts in treating the executor or administrator as the representative of the decedent alone, or also of the creditors. For it is universally recognized that a fraudulent conveyance, though void as to creditors, is nevertheless good and valid between the parties, and can only be avoided by creditors. As representative of the decedent, the executor or administrator can avoid such conveyances only which the testator or intestate could have avoided; but, as representative of the creditors of an insolvent estate, he may stand upon their rights, and assert claims which the decedent could not have asserted. This question is ruled differently in the different States. The action is held maintainable, and the right of executors and administrators to subject such property to sale for the payment of debts is recognized in California,† Connecticut,‡ Iowa,§ Louisiana,|| Maine,¶ Massachusetts,** New Hampshire,†† New York,‡‡ Pennsylvania,§§ and Vermont.|||| The contrary is held in Alabama,¶¶ Arkan-

* As existing in California, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, North Carolina, Ohio, Texas, Vermont, and Wisconsin. These statutes, generally, provide that the action is to be brought upon the request of creditors, who are liable for costs if it prove fruitless.

† *Ford v. Exempt Fire Co.*, 50 Cal., 299, 302.

‡ *Andross v. Doolittle*, 11 Conn., 283, 287; *Minor v. Mead*, 3 Conn., 289; *Booth v. Patrick*, 8 Conn., 106; *Freeman v. Burnham*, 86 Conn., 469.

§ *Cooley v. Brown*, 30 Iowa, 470, 472.

|| *Sullice v. Gradenigo*, 15 La. An., 582; *Judson v. Connelly*, 4 La. An., 169.

¶ *Caswell v. Caswell*, 28 Me., 232; *McLean v. Weeks*, 61 Me., 277, 280.

** *Holland v. Craft*, 20 Pick., 321, 328; *Martin v. Root*, 17 Mass., 222, 228; *Chase v. Redding*, 13 Gray, 418; *Welsh v. Welsh*, 105 Mass., 229; *Drinkwater v. Drinkwater*, 4 Mass., 354; *Yeomans v. Brown*, 8 Metc., 51, 56; *Norton v. Norton*, 5 Cush., 524; *Bowdoin v. Holland*, 10 Cush., 17.

†† *Cross v. Brown*, 51 N. H., 486; *Abbott v. Tenney*, 18 N. H., 109.

‡‡ *McKnight v. Morgan*, 2 Barb., 171; *Bate v. Graham*, 11 N. Y., 237, 240, 242; *Brownell v. Curtis*, 10 Paige, 210, 218.

§§ *Buehler v. Gloninger*, 2 Watts, 226; *Stewart v. Kearney*, 6 Watts, 453; *Bouslough v. Bouslough*, 68 Penn. Stat., 495, 499.

|||| *McLane v. Johnson*, 43 Vt., 48, 60. But, before the statute to that effect, the administrator had no such power: *Peasley v. Barney*, 1 Chip., 331, 334; *Martin v. Martin*, 1 Vt., 91, 95.

¶¶ *Davis v. Swanson*, 54 Ala., 277; *Marler v. Marler*, 6 Ala., 367; *Walter v. Bonham*, 24 Ala., 513.

sas,* Georgia,† Illinois,‡ Kentucky,§ Maryland,|| Mississippi,¶ Missouri,** North Carolina,†† Ohio,‡‡ South Carolina,§§ Tennessee,||| Texas,¶¶ and Virginia.***

Conducting the Sale.—In selling the real estate of his testator, or intestate, the executor or administrator must act strictly within his powers under the statute, and according to the directions contained in the order of sale. He is personally liable on his bond for any deviation. Thus, if he is directed to sell for cash, a sale on credit is in excess of his authority;††† and if he reports that he has fully complied with the order, when in fact he has not, he is liable for any loss arising out of the failure.††† A private sale by

* *Eubanks v. Dobbs*, 4 Ark., 173.

† *Beale v. Hall*, 22 Ga., 431, 457.

‡ *Harmon v. Harmon*, 63 Ill., 512.

§ *The Commonwealth v. Richardson*, 8 B. Mon., 81, 93. But, in this State, property fraudulently obtained by the administrator from his intestate, during his lifetime, is held to be assets in the administrator's hands: *Emmerson v. Herriford*, 8 Bush, 229.

|| *Kinnemon v. Miller*, 4 Md. Ch., 407; *Dorsey v. Smithson*, 6 Har. & J., 61, 63.

¶ *Armstrong v. Stovall*, 26 Miss., 275, 277; *Winn v. Barnett*, 31 Miss., 653, 659; *Blake v. Blake*, 53 Miss., 182, 193.

** *George v. Williamson*, 26 Mo., 190; *Brown v. Finley*, 18 Mo., 375; *McLaughlin v. McLaughlin*, 16 Mo., 242; 249.

†† *Coltraine v. Causey*, 3 Ire. Law, 246.

‡‡ *Benjamin v. Le Baron*, 15 Ohio, 517 (*Birchard, J.*, dissenting).

§§ *King v. Clarke*, 2 Hill (S. C.) Ch., 311; *Chappell v. Brown*, 1 Bailey, 528, 531; *Anderson v. Belcher*, 1 Hill (S. C.) L., 246, 248. But where the administratrix herself is the fraudulent donee she is liable to creditors: *Burckmayer v. Mairs*, *Riley L.*, 208.

||| *Lassiter v. Cole*, 8 Hump., 621; *Sharp v. Caldwell*, 7 Hump., 415; *Moody v. Fry*, 3 Hump., 567. *Contra*, *Marr v. Ricker*, 1 Hump., 348.

¶¶ *Connell v. Chandler*, 13 Texas, 5; *Cobb v. Norwood*, 11 Texas, 556; *Avery v. Avery*, 12 Texas, 54, 57, overruling an intimation to the contrary in *Danzy v. Smith*, 4 Texas, 411. But it is again intimated, in *Hunt v. Butterworth*, 21 Texas, 133, 141, that the administrator is the proper party to sue to set aside the intestate's fraudulent conveyance for the benefit of creditors.

*** *Backhouse v. Jett*, 1 Brocken., 500, 507; *Thomas v. Soper*, 5 Munf. 28.

††† And the sale is void unless subsequently confirmed by the court of chancery, or ratified by the heirs: *McCully v. Chapman*, 58 Ala., 325. In Iowa the sale must be for cash: *Richards v. Adamson*, 43 Iowa, 248.

††† If, for instance, he takes the personal notes of the purchaser for the purchase-money, where the order required him to take notes with at least two sufficient sureties, although the makers were amply solvent at the time of execut-

him confers no title, unless the order, under the statutory power of the court, so direct.* Since he has no power to sell, without order or decree of the court, an agreement or bond made by him before obtaining such order to sell the land of his intestate, is utterly void and incapable of being enforced at law or in equity;† but, while such agreement is void as to the estate, it may constitute a valid obligation against the executor or administrator personally.‡ But in Georgia the statute allows a sale by private contract, if afterward the sale be made good by a sale at public auction.§

Inasmuch as the authority of the administrator is derived from the order of sale, he can sell only so much land as is specified therein; if he sell more, the sale is void.|| And so if he sell more than is necessary to pay the debts, although the order may so direct, for such order is itself void.¶ But he may sell less land than the order provides; and, if he make proclamation at the time of sale of restriction of the quantity to be sold, purchasers will be bound thereby, whether they heard him or not.**

The statements and representations of the administrator, even if made at the time of the sale, do not bind the estate, except as to such matters as are clearly within his discretion.†† Such state-

ing the notes: *Payne v. Pippy*, 49 Ala., 549. To the like effect, *James v. Faulk*, 54 Ala., 184; *Fontinet v. De Baillon*, 8 La. An., 509.

* *Fambro v. Gantt*, 12 Ala., 298.

† It is held to be against public policy to allow the administrator to place himself in a position where the exercise of his lawful authority would be influenced or controlled by previous contracts binding upon him: *Stuart v. Allen*, 16 Cal., 473, 498; *Bridgewater v. Brookfield*, 3 Cow., 299. And in those States in which the sale must be by public outcry to the highest bidder, it would be to his interest to discourage bidding, because he is liable for the difference between the price agreed upon and what the land would bring at public auction: *Herreck v. Grow*, 5 Wend., 579; *Logan v. Gigley*, 9 Ga., 114.

‡ *Logan v. Gigley*, *supra*; *Dresel v. Jordan*, 104 Mass., 407, 413.

§ It should be proclaimed at such public sale that its purpose is to make the title good, and it is open to review: *Noeworthy v. Blizzard*, 53 Ga., 668, 673.

|| *Wakefield v. Campbell*, 20 Me., 393, 400; *Litchfield v. Cudworth*, 15 Pick., 23, 32 (holding the whole sale void, as no distinction will be made between what was and what was not authorized to be sold); *Adams v. Morrison*, 4 N. H., 166; *Wells v. Mills*, 22 Tex., 302, 304 *et seq.*

¶ *Gill v. Givens*, 4 Metc. (Ky.), 197. ** *Lee v. Hester*, 20 Ga., 588, 592.

†† As, for instance, statements concerning the validity of the title do not bind the estate: *Dunlap v. Robinson*, 12 Ohio Stat., 530; *Giles v. Moore*, 4 Gray, 600.

ments may; if they mislead the purchaser, constitute fraud as to him, for which the administrator is personally liable, but they are not covenants.* But if he agree that a mortgage, constituting an incumbrance upon the land offered, shall be paid off out of the purchase-money, such agreement is binding,† and if he sell subject to an easement existing, but not alluded to in the order of sale, the purchaser is bound thereby.‡ If he make proclamation of a change from the advertised terms of sale, the proof must be clear that the purchaser heard him, or he will not be bound by such change.§ As to the power of the administrator to bind the estate by his representations, see also *post*, under the head of “The Deed of Conveyance.”

The sale must be conducted by the executor or administrator in person, except in those States in which the law provides for the appointment of commissioners of sale,|| or, where sales may be under execution by the sheriff,¶ the court cannot appoint the sheriff,** or any other person but the administrator, to sell.†† Nor can the administrator, as a general rule, delegate his power, or sell by agent or attorney in fact,‡‡ although such has been ruled

* *Mellen v. Boarman*, 13 Smed. & M., 100, 101; *Westfall v. Dungan*, 14 Ohio Stat., 276.

† *May v. Taylor*, 27 Texas, 125, 128. And where the purchaser and administrator agreed that the amount of an incumbrance should be deducted from the face of any nominal bid, the purchaser was not allowed to object to the deed on the ground that it stated the consideration to be smaller than the nominal bid: *Stebbins v. Field*, 43 Mich., 333.

‡ *Overdeer v. Updegraff*, 69 Penn. Stat., 110, 117.

§ *Daniel v. Jackson*, 53 Ga., 87.

|| As, for instance, in Mississippi: *Alcorn v. The State*, 57 Miss., 273. In North Carolina, *Roberts v. Roberts*, 65 N. C., 27.

¶ As in Louisiana: *Succession of Gallain*, 31 La. An., 173, 175; *Succession of Fouletien*, 28 La. An., 638. Florida: *Union Bank v. Powell*, 3 Fla., 175, 196.

** *Jarvis v. Russick*, 12 Mo., 63.

†† *Swan v. Wheeler*, 4 Day, 137, 140; *Crouch v. Evelith*, 12 Mass., 503; *Alcorn v. The State*, 57 Miss., 273.

‡‡ This point was doubted in Missouri: *Rugle v. Webster*, 51 Mo., 246, 250; but by analogy with the decisions concerning the powers of trustees in deeds of trust securing the payment of debts, it would seem to be held necessary that the administrator should act in person. The discretion of such a trustee is certainly no greater than that of an administrator, and it was held that a sale made by a trustee when he was not personally present at the crying off, was void: *Graham v. King*, 50 Mo., 22, 24. In Illinois, a sale made through an agent will be set aside, if application to that effect be made in a reasonable time; but a delay of

in several States.* If the sale be at public outcry, the administrator may himself act as auctioneer,† or employ one to cry the sale in his presence.‡

If the statute or order of the court require the sale to be on a day when a certain court is in session, the proceedings must show that such was the fact, or the sale will be void.§

In some States it is held that if, from the extremity of the weather, or other unavoidable cause, there be no bidders present, or the competition be so low that the property would not bring above one-half of its value, it is the duty of the administrator to adjourn the sale to some future day, and a sale on such adjourned day, if the adjournment has been *bona fide* and without fraud, will be sustained.|| But this seems an unwise rule, and is not likely to be followed in other States; it is clearly much safer, and attended with little or no increase of cost and inconvenience, to obtain a new order of sale if no bidders were present, or report the result and submit the question of the propriety of another sale to the court, if there is hope of a better result at another time.¶

It is usual to require a deposit of part of the purchase-price to secure the consummation of the sale on its approval. This is held to be a reasonable precaution; and one-fourth of the price bid has been held not unreasonable.**

The Purchase-money.—It is the duty of the administrator to collect the purchase-money before making a deed to the purchaser, if the sale is for cash. It has already been stated,†† that this means ready money in the legal currency of the country; or,

fifteen years is such inexcusable laches as will prevent relief in equity: Kellogg v. Wilson, 89 Ill., 357.

* In Arkansas: Sturdy v. Jacoway, 19 Ark., 499, 518. Georgia: Cheever v. Hora, 22 Ga., 600. New Hampshire: Currier v. Green, 2 N. H., 225. But the sale is voidable, if such agent purchase for himself, or as agent for another person: Bond v. Watson, 22 Ga., 637.

† Laflon v. Doiron, 12 La. An., 164.

‡ Kellogg v. Wilson, *supra*.

§ Ainge v. Corby, 70 Mo., 257, 260; Mobly v. Nave, 67 Mo., 546. It is held in these cases that the recital in the report and confirmation by the court may be rebutted by the record entry showing that the court stood adjourned on the day in question, even in a collateral proceeding.

|| Norris v. Howe, 15 Mass., 175; Beaubien v. Poupard, Harr. (Mich.), 206.

¶ See *infra*, on the subject of confirming sales.

** Allen v. Shepard, 87 Ill., 314, 316.

†† 7 South. L. Rev., 672.

as it was expressed in Alabama, legal tender currency, or its equivalent.* He will not be held liable, however, for failure to collect the purchase-money where the sale was by a master in chancery, whose duty it was to collect.† He has no power to make a valid agreement with a partial number of the heirs to deduct a part of the purchase-money for an alleged deficiency in the quantity of land sold to them;‡ nor can an heir retain the purchase-money until his share to which he may be entitled out of the estate be ascertained, if the money is needed for purposes of administration.§ The same is true of a creditor purchasing; he cannot retain out of the purchase-money a sum equal to his demand against the estate, because all creditors have an interest in the estate, and the share to which each is entitled must first be determined by the court.|| Yet an administrator may agree with a creditor that, if he become purchaser, his claim may be deducted from the purchase-price to the extent of the dividend to which it may be entitled.¶ So, a purchaser who holds a lien or mortgage antedating the title of the deceased owner, may retain out of the purchase-price enough to pay such mortgage.** The creditor of an insolvent succession holding a *first* mortgage from the decedent on the property sold, or on a portion of it, may, on buying the property at administrator's sale, retain the amount of his mortgage on giving bond to indemnify a superior lien; but if creditors with inferior or concurrent mortgages become purchasers, they must pay the whole amount of their bids to the

* Hence, Confederate treasury notes were held to be good only for their market not their nominal value: *Wilson v. Bothwell*, 50 Ala., 379; *Kitchell v. Jackson*, 44 Ala., 302.

† *Thompson v. Wagner*, 3 Desauss., 94.

‡ *Dees v. Tilden*, 2 La. An., 412, 414.

§ *Succession of Cordeviollé*, 24 La. Ann., 319.

|| *Schwallenberg v. Jennings*, 43 Md., 554, 559; *Brandon v. Allison*, 66 N. C., 532.

¶ *Norton v. Edwards*, 66 N. C., 367.

** *Succession of Triche*, 29 La. An., 384. It is clear that under such circumstances the administrator had only the equity of redemption to sell—the difference between the value of the land and the debt or lien upon it. In Missouri, and probably in many other States, the statute discriminates between administrator's sales of the legal title and sales where the legal title is in another, or subject to a paramount right; as, for instance, the vendor's lien.

administrator, and receive from him their *pro rata* share, if any, of the proceeds.*

As a matter of right, and therefore an overruling principle of law, the purchaser at an administrator's sale for the payment of debts takes that interest, and that only, which the deceased debtor had in the lands. The rights of others, whether holding by superior or equal title, cannot be affected by such proceeding; and where such rights are doubtful or unclear, the sale should, as has been already stated,† be deferred until they can be ascertained in due course of law. From this it follows that the purchaser at the administrator's sale takes subject to all liens, mortgages, or titles, of whatever nature, which are superior to the title of the deceased debtor. And in such case, where the existence of such liens is known, it becomes a question of policy whether the best course for the estate is to sell the land as the administrator finds it, subject to the liens or mortgages, or whether a better price can be obtained by undertaking to clear the title before, or out of the proceeds of the sale, so that the purchaser may buy an undisputed and clear estate. This is recognized in the statutes of some of the States, and provisions made accordingly.‡ Where

* Succession of Triche, *supra*.

† 7 South. L. Rev., 656.

‡ Foltz v. Peters, 16 Ind., 244, 246: "It is manifest, then," says Hanna, J., commenting upon the effect of the statute of Indiana, on this subject, "that the court may order the property to be sold subject to existing liens, or for the purpose of discharging liens. If a purchase should be made under the former order, the purchaser would buy subject to, and the property be liable to, the liens, in addition to the sum the purchaser might agree to pay; and the representative of the estate might also require a bond that such liens should be discharged, and should not become a claim against the estate at any future time. If a sale should be made under the latter clause, and an order based thereon, the purchase-money would be applicable to or toward the discharge of the lien, and the purchaser would receive the property freed from the lien, although it might not be fully paid; the balance remaining a claim against the estate, if in a condition to be presented as such." And where real estate is ordered to be sold to discharge the liens of judgment upon it (under provisions of the statute, Rev. Stats., 1843, p. 532, sect., 251), the title of the purchaser relates back, as in case of sheriff's sales, to the date of the oldest judgment upon which the sale takes place. Hence such land is not subject, in the hands of the purchaser, to sale upon younger judgments: West v. Townsend, 12 Ind., 434, 435.

In Georgia it is held that the sale of land of a testator or intestate, in the manner prescribed by law, where the estate is insolvent, divests the liens of judgments obtained in the lifetime of the testator or intestate, and the creditor

neither the statute nor the order of court direct otherwise, the purchaser takes the land subject to all incumbrances to which it is liable.*

must look to the proceeds in the hands of the representative of the estate : *Sims v. Ferrill*, 45 Ga., 585, 598 ; *Carhart v. Vann*, 46 Ga., 389, in which Montgomery, J., reviews the common law, and the policy of Georgia under its statutes on the subject of judgment-liens, and says that "although a judgment-debt may be the highest in dignity during the life of the debtor, on his death it at once takes rank below other classes," and thence deduces the necessity of allowing the sales by executors and administrators to pay the debts of the estate to divest judgment liens (p. 392). In *Stallings v. Ivey*, 49 Ga., 274, this principle is pushed to the extent of including vendors' liens, Trippe, J., deducing this from the reasoning in *Carhart v. Vann*, *supra*, and the policy of that State protecting the claims of creditors against vendor's liens without notice, as announced in *Webb v. Robinson*, 14 Ga., 216, to which he adds : "Another serious difficulty would exist if a contrary rule were held,—a difficulty that would bar the whole policy of the law as to administrators' sales. A vendor's lien can only be asserted in equity. . . . A decree would be required and a sale had under that decree. In the meantime the representative of the estate could do nothing toward making a sale, however urgent the necessity might be to discharge those claims or debts which at least would be first paid, but which would be compelled to be brought into a suit in equity, so as to be protected by the decree of the court in such suit. Thus, in cases of debts of unquestioned priority, there would practically be a bill to marshal assets, with greatly increased expenses, and a delay seriously postponing those who so properly are the first objects of the law's bounty and protecting care" (p. 277 *et seq.*). The reasoning of the judge is convincing, if once it be granted that debts of the vendee are prior in dignity to the vendor's lien. The doctrine is affirmed in *Newson v. Carlton*, 59 Ga., 516.

The same doctrine prevails in Louisiana with regard to judgment-liens, there called judicial mortgages. The mortgage creditors may pursue the fund arising from the administrator's sale, and the purchaser takes the land discharged from liens : *Succession of Tureaud v. Gex*, 21 La. An., 253 ; *Succession of Ynogoso*, 13 La. An., 559.

In Missouri the statute on this subject is very full and satisfactory. Sales by executors and administrators *cum testamento* under the will, and executors and administrators under order of the court, are specifically provided for. Sales to satisfy the vendor's lien, or satisfaction of the lien out of the personalty or proceeds of other real estate, may be ordered in the discretion of the court : *Rev. Stats.*, sects. 138-140. At such sales the purchaser takes subject to the unpaid purchase-money for which the land remains liable ; the unpaid purchase-money may be allowed as a debt against the estate, but the court cannot enforce the payment out of the purchase-money or declare a lien : *Ross v. Julian*, 70 Mo., 209. Land incumbered by a mortgage or deed of trust by the deceased owner, may likewise be redeemed or the interest of the deceased therein sold, as may appear best or feasible, according to the circumstances

* *McConnell v. Smith*, 39 Ill., 279, 289.

If the purchaser fail to pay the price bid by him, the administrator should resell the property;* but it seems wise, if not absolutely necessary, that he should report the fact of non-payment, and obtain an order of the court to resell. Such an order

of the case: Rev. Stats., sects. 143-145. These sales are plainly subject to the liens or mortgages for which the land remains liable in the hands of the purchaser; and if the administrator nevertheless pays off such mortgage or deed of trust, he is not allowed credit for the amount so paid in his administration account, but may be subrogated to the rights of the mortgagee against the purchaser: *Greenwell v. Heritage*, 71 Mo., 459; *Griffith v. Townley*, 69 Mo., 13. The right of the mortgagee to foreclose or subject the land to the satisfaction of his debt thereby secured, is not affected by the death of the mortgagor or grantor in the deed of trust, except that the foreclosure is thereby postponed for nine months thereafter: Rev. Stat., sect. 145; *Ayres v. Shannon*, 5 Mo., 232. But liens of judgments existing at the time of the debtor's death are extinguished by the sale to pay debts, and the judgment or attachment creditors have a prior right of satisfaction out of the proceeds, according to their seniority: Rev. Stats., 1879, sects. 152-160.

In Ohio the purchaser at an administrator's sale takes the land discharged of all creditors' liens, whether arising from mortgages or judgments. "The priority which one creditor may have acquired over others, by virtue of a mortgage or other specific lien upon the land sold, the statute transfers to the fund arising from the sale; and to this fund he must look instead of the land." Scott, J. C., in *Defrees v. Greenham*, 11 Ohio Stat., 486, 488 *et seq.* (affirming *Muskingum v. Carpenter*, 7 Ohio, 21). But since the amendment to the statute of date April 12th, 1858, requiring mortgagees and other lien-holders to be made parties to a petition for the sale of lands, a mortgagee who was not made such party retains his rights unaffected by the administrator's sale, and the purchaser is liable therefor, having purchased, according to the maxim of *caveat emptor*, with constructive notice of the existence of the lien: *Holloway v. Stewart*, 19 Ohio Stat., 472, 474.

In Pennsylvania, "whatever doubts may have formerly existed on the subject, none exist now that an Orphans' Court sale of a decedent's real estate is a judicial sale, and divests the liens of mortgages, as well as of all other debts that are capable of ascertainment in moneys numbered." "Such real estate," says the twentieth section of the Act of February 24, 1834 (*Purd. Dig.*), 289, "so sold, shall not be liable in the hands of the purchaser for the debts of the decedent." "These are simple, but very effective words. They encourage bidders to pay outside prices, and they sweep off all liens which debts of the decedent may have occasioned, except only certain fixed liens, like a widow's dower, which are incapable of pecuniary admeasurement. And a mortgage given by a former owner of the estate is a debt of the decedent who dies seised of the estate as truly as if he had made the mortgage himself." Woodward, C. J., in *Cadmus v. Jackson*, 52 Penn. Stat., 295, 303 *et seq.* (quoting as authority for the last statement, *Moore v. Schultz*, 13 Penn. Stat., 101).

* *Duncan v. Armant*, 3 La. An., 84.

is conclusive upon the former purchaser, if he have notice that a motion to that effect will be made.* The purchaser refusing to comply with the terms of the sale is liable for any difference between his bid and the price which may be realized on the second sale, if it be less,† although the amount of the second sale was sufficient to pay the debts.‡ But the administrator must proceed to resell as soon as practicable; if he delay, his right to recover for the difference will be lost.§

We have seen that in some States sales are required to be for ready money.|| But if he be authorized, as he may be in most States, to sell on time, it is his duty to obtain security for the purchase-money, in default of which he is personally liable for the amount due.¶ If the security which he takes turn out to be worthless, he is *prima facie* liable,** and where he takes security,

* *Brummagin v. Ambrose*, 48 Cal., 366: This case is emphatic on the question of the conclusiveness of the order of re-sale by the probate court. The purchaser, having received personal notice that a motion for the order would be made, was estopped from showing, in a suit for the difference between his bid and the amount realized upon the second sale, that the administrator made fraudulent representations to him at the first sale; that he paid him back the ten per centum deposit at the first sale, and released him from his bid, and took an assignment thereof; that the sale was cancelled by the administrator because he could not give possession; or that the administrator, in giving the notice, stated that it was merely for the purpose of obtaining a re-sale, and would not cast any liability upon him. In Pennsylvania it is held that the order of re-sale must be preceded by a revocation of the confirmation; *Banes v. Gordon*, 9 Penn. Stat., 426.

† *Mount v. Brown*, 33 Miss., 565; *Daniel v. Jackson*, 53 Ga., 87; *Alexander v. Hening*, 54 Ga., 200; *Smith v. Kinney*, 30 La. An., 332.

‡ *Cobb v. Wood*, 8 Cush., 228, 230.

§ *Saunders v. Bell*, 56 Ga., 442 (in which the right of the administrator to recover after a delay of twelve months was denied, although the motive for a delay was to obtain a better price). Where a purchaser at an administrator's sale died without having paid for the land, and his administrator again sold it, and the widow of the purchaser bought it, but paid nothing, and no deeds were ever made: *held*, in a proceeding in equity, that the land should be sold, and the proceeds applied first to the payment of the amount due the estate of the original owner, and next to the estate of the first purchaser: *McClure v. Williams*, 58 Ga., 494.

|| 7 South. L. Rev., 672. It was doubted, at one time, in Michigan, whether the administrator can sell on credit: *Palmer*, Appellant, 1 Dougl., 422.

¶ *King v. King*, 3 Johns. Ch., 652; *Davis v. Yerby*, 1 Smed. & M. Ch., 508, 516.

** *Curry v. The People*, 54 Ill., 263, 265.

by reason of which the vendor's lien is waived, he is personally liable, whether the security he took was good at the time or not.* His claim for the purchase-money constitutes a vendor's lien, as in other cases of sale,† and he may retain his statutory lien and also take additional security;‡ and it was held in Pennsylvania that he could not proceed against the sureties before exhausting his remedy against the land;§ but the court soon reversed this decision, and it is now held that the administrator may at once proceed against the sureties.||

Where a purchaser conveyed to an administrator other real estate in lieu of that which he purchased from the estate, and the administrator took such real estate in discharge of a debt due him from the estate, it was held that he might protect his title in equity to the extent to which his purchase benefited the estate.¶

(11.) *Report and Confirmation of the Sale.*—To enable the probate court to examine the doings of the administrator, and determine whether he has complied with all the requirements of the statute and of the order of the court touching the sale, it is the duty of executors and administrators to report to the court what he has done in the premises.** It is held that the sale is void, without approval or confirmation by the court;†† that the purchaser acquires no title until the sale is approved,‡‡ and cannot be required to comply with the terms of sale before confirmation;§§ that the sale without confirmation is voidable, but not

* Palmer, Appellant, *supra*.

† See Wallace v. Nichols, 56 Ala., 321, 323 *et seq.*, as to the effect of a sale where the purchase-money has not been paid.

‡ Haggatt v. Wade, 18 Miss., 143, 148.

§ Hawk v. Geddis, 16 Serg. & R., 23, 29.

|| Geddis v. Hawk, 1 Watts, 280, 286.

¶ Nosworthy v. Blizzard, 53 Ga., 668.

** In re McFeeley, 2 Redf., 541, 542; Kelley's Estate, 1 Abb. (N. C.), 102, 105.

†† Rea v. McEachron, 13 Wend., 465, 468 *et seq.*; Neill v. Cody, 26 Texas, 286; Graham v. Hawkins, 38 Texas, 628, 632; Mitchell v. Bliss, 47 Mo., 53. In New York, confirmation by the court was not necessary before the act requiring it: Fox v. Lipe, 24 Wend., 164, 167.

‡‡ Mason v. Osgood, 64 N. C., 467; Haliburton v. Sumner, 27 Ark., 460, 463. And the purchaser is presumed to know that he buys subject to confirmation; he is not, therefore, entitled to notice: Davis v. Stewart, 4 Texas, 223; Yerby v. Hill, 16 Texas, 877.

§§ Neill v. Cody, *supra*; Bradbury v. Reed, 23 Texas, 258, 264. The admin-

void in collateral proceedings,* and that the confirmation operates to cure previous irregularities in the proceedings.† It is the judicial ascertainment and determination that the sale is valid and legal, and hence its validity cannot thereafter be questioned in any collateral matter.‡ If the administrator neglect or refuse to report the sale for confirmation, he may be compelled to do so by order of the probate court;§ or there may be application to a court of chancery for confirmation.|| Where several parcels or tracts have been sold and are returned in one report, the sale may be confirmed as to one or more of the parcels or tracts, and vacated as to others.¶ The report may be approved at a subsequent term of the court;** but, in Missouri, it must be made to the term next after the sale, and may be confirmed at any term thereafter to which it may be continued; but, if made and confirmed at the term during the existence of which the sale was made, it is irregular and voidable.†† If the court, by subsequent

istrator cannot maintain a suit for the purchase-money, while he fails to have the sale confirmed: *Dowling v. Duke*, 20 Texas, 181.

* *Moore v. Neill*, 39 Ill., 256, 263; *Bonner v. Greenlee*, 6 Ala., 411; *Smith v. Denson*, 2 Smed. & M., 326, 338; *Wallace v. Hall*, 19 Ala., 367, 371 (being a sale by commissioners); *Bradbury v. Reed*, 23 Texas, 258; *Littlefield v. Tinsley*, 26 Texas, 353.

† So, where the statute required advertising in one paper, but the order to sell directed advertisement in two, and the administrator advertised in one only, the confirmation was held to cure this defect: *Sankey's Appeal*, 55 Penn. Stat., 491.

‡ *Sturdy v. Jacoway*, 19 Ark., 499; *Thorn v. Ingram*, 25 Ark., 52, 58; *Osman v. Traphagen*, 23 Mich., 80, 88. But see, on this point, *infra*, in connection with the subject of validity of sales in collateral proceedings. The confirmation gives no validity to void or fraudulent sales: *Platt v. St. Clair*, *Wright*, 261; s. c., 6 Ohio, 227.

§ *Stow v. Kimball*, 28 Ill., 93, 108; *Mason v. Osgood*, 64 N. C., 467.

¶ *Rea v. McEachron*, 13 Wend., 465.

|| *Delaplaine v. Lawrence*, 3 N. Y., 301; *Bacon v. Morrison*, 57 Mo., 68 (holding the approval good, where part of the land had been bought by the probate judge, as to the other portions reported).

** *Sankey's Appeal*, 55 Penn. Stat., 491; *Baker v. Henry*, 63 Mo., 517, 520. But a probate judge cannot approve a sale after the expiration of his term of office: *Bradford v. Cook*, 4 La. An., 229.

†† *Sims v. Gray*, 66 Mo., 613, 616; *Wilkerson v. Allen*, 67 Mo., 502, 508. Before the decision in *Beazley v. Johnson*, sales so reported and approved were held void on the ground of want of jurisdiction at such term: *Speck v. Wohlien*, 22 Mo., 310; *Strouse v. Drennan*, 41 Mo., 289; *Mitchell v. Bliss*, 47 Mo.,

acts appearing of record, recognize the sale as valid, its confirmation by the court will be presumed, though not entered of record.* So an order upon the administrator to make a deed, is equivalent to an approval of the sale.†

Much discretion is necessarily vested in the judge in passing upon the report of sale. It is his duty to disapprove the sale if he believe it to be unfair, or not in conformity with the law,‡ or for irregularities in the description;§ but not for such misdescription in the advertisement from which no injury has resulted,|| nor for the delay in filing the report of sale within the time required by statute.¶ Mere inadequacy of the price obtained is not a sufficient ground to vacate the sale unless he is satisfied that upon a resale a better price can be reasonably expected; ** but if the price is inadequate at the time of sale, and there is a reasonable prospect that ten per centum will be obtained in addition, it is his duty to order a new sale.†† In California it is held, that where, upon the report of the sale, a new bidder offers at least ten per centum more than the purchaser at the sale, the court may, in its discretion, either accept the new bid or order a new sale;‡‡ but in Alabama, if the sale is vacated on account of the inadequacy of the price, it is error to permit the purchaser to increase his bid; a new sale should be ordered.§§ In Pennsylvania the court may, before the consummation of a private sale, receive

353. And for the same reason it was held that such approval, being a nullity, does not operate as a legal disposition of the report, but leaves it in abeyance, and its approval, several years afterward, if otherwise regular, will be valid: *McVey v. McVey*, 51 Mo., 406, 424. But, after final settlement, the probate court has no authority to approve a sale: *Garner v. Tucker*, 61 Mo., 427, 434.

* *Grayson v. Weddle*, 63 Mo., 523, 538; *Jones v. Manly*, 58 Mo., 559, 564.

† *Livingston v. Cochran*, 33 Ark., 294, 298.

‡ And he is not required to state of record his reasons for confirming or rejecting the report: *Davis v. Stewart*, 4 Texas, 223.

§ *Estate of Campbell*, 1 Tuck. Sur., 240; *Duval v. Bank*, 10 Ala., 636, 653.

|| *Succession of Wadsworth*, 2 La. An., 966.

¶ *Brown v. Hobbs*, 19 Texas, 167.

** *Horton v. Horton*, 2 Bradf., 200; *Allen v. Shepard*, 87 Ill., 314.

†† *Kain v. Masterson*, 16 N. Y., 174, 177; *Campbell's Estate*, 1 Tuck. Sur., 240; *Delaplaine v. Lawrence*, 3 N. Y., 301; *Wright v. McNutt*, 49 Texas, 425.

‡‡ *Griffin v. Weaver*, 48 Cal., 383; *Perkins v. Gridley*, 50 Cal., 97, 100.

§§ *Field v. Gamble*, 47 Ala., 443, 447; so in Pennsylvania, an order for resale must annul the confirmation: *Banks v. Gordon*, 9 Penn. Stat., 426.

a more favorable bid;* and if the highest bidder refuse to comply with the terms of the sale, the property may be confirmed to the next bidder.† So, the court may substitute one person as purchaser for another, with the consent of both.‡

The confirmation does not of itself constitute or complete the sale; the title of the heirs is not divested until the purchase-money is paid and a deed delivered.§ Nor can the court, in passing upon the report of sale, go behind or revise the order of sale.||

The probate court cannot, generally, review or set aside its judgment in confirming a sale after the expiration of the term at which it is rendered;¶ in some of the States, however, the power to review and set aside its orders is vested in this court,** and a sale may be annulled at a term subsequent to the filing of the report, if it has not been confirmed.†† But sales will be set aside in equity where there has been fraud,‡‡ or where the purchase was by an appraiser,§§ or for great and manifest inadequacy of price, from which fraud may be presumed,||| and where the purchase has been by the executor or administrator himself, or his relatives.

Executors selling under power in the will are not required to report the sale for confirmation,¶¶ unless it be a mere naked power,

* Brown's Appeal, 68 Penn. Stat., 53.

† Stiver's Appeal, 56 Penn. Stat., 9, 13.

‡ Davis v. Touchstone, 45 Texas, 490, 497.

§ Overdeer v. Updegraff, 69 Penn. Stat., 110; Leshey v. Gardner, 3 Watts & S., 314.

|| Allen v. Shepard, 87 Ill., 314.

¶ Evans v. Singletary, 63 N. C., 205; Thompson v. Cox, 8 Jones L., 311; Davis v. Stewart, 4 Texas, 223; Carter v. Waugh, 42 Ala., 452, 455.

** So in North Carolina, when the confirmation was without notice to the parties in interest: Stradley v. King, 84 N. C., 635; Hyman v. Jarnigan, 65 N. C., 96. In Mississippi, when the rights of innocent strangers are not affected; Leonard v. Cameron, 39 Miss., 419, 422.

†† McSwenn v. Faulks, 46 Ala., 610.

‡‡ Van Horn v. Ford, 16 Iowa, 578, 583; Smith v. Chew, 35 Miss., 153.

§§ Armstrong v. Hurton, 8 Ohio, 552.

||| But not after an unreasonable delay by complainants: Haynes v. Swann, 6 Heisk., 560; and all the heirs must be parties in such case: Hoe v. Wilson, 9 Wall., 501, 503; nor where the rights of strangers have attached: Sively v. Summers, 57 Miss., 712, 730.

¶¶ Estate of Delaney, 49 Cal., 76, 85 et seq.

or when they sell under order of the court, in which case they must report for confirmation like administrators selling.*

In New York, irregularities in administrators' sales under order of the surrogate may be rectified in chancery.†

(12.) *The Deed of Conveyance*.—Statutes, authorizing the sale of decedents' lands for the payment of their debts, contemplate, and can contemplate, nothing more than the transfer, by means of such sale, of the interest or estate of the decedent to the purchaser. Executors and administrators are the agents or instruments of the law to accomplish this purpose. The legitimate office of the words of conveyance in an executor's or administrator's deed is to effect this object, and must be construed with an eye thereto. Nowhere is the principle, that general words of a releasor or grantor are to be restrained to the occasion, more fully applicable than to such deeds. Hence, covenants of warranty contained therein, if binding at all, bind only the estate; the words "grant, bargain, and sell" imply no personal undertaking, for they are used by the executor or administrator in the execution of a trust, and are to be understood as limited to the occasion.‡ Such covenants, whether express or implied, are a part of their official acts, and devolve no personal liability upon them.§ So far, then, as covenants and words of warranty in an administrator's deed are fairly referable to their official or representative capacity or duty, their effect is limited to the estate alone, and in no manner affect the personal right or liability of the administrator.|| For the same reason, the executor or administrator is not personally responsible for the truth of the recitals in the deed.¶

* Estate of Durham, 49 Cal., 490, 495; Perkins v. Gridley, 50 Cal., 97.

† In re Hemiup, 2 Paige, 316; a. c., 3 Paige, 305; Bostwick v. Atkins, 3 N. Y., 53.

‡ Per Woodward, J., in Shontz v. Brown, 27 Penn. Stat., 121, 133 *et seq.*

§ "Although they signed the deed without designating themselves as administrators:" Shontz v. Brown, *supra*.

|| Wright v. De Groff, 14 Mich., 164, 168; Dickenson v. Campbell, 14 Mich., 544, 548; Day v. Brown, 2 Ohio, 345 (p. 443 of 2d ed.); Grantland v. Wight, 5 Munnf., 295. Thus, where a widow, administratrix, in executing specifically articles of sale by her deceased husband, under order of the Orphans' Court, conveyed not only all her husband's estate, but her own in law and equity, it was held not to bar her dower, which was the only interest she had in the land: Schurtz v. Thomas, 8 Penn. Stat., 361.

¶ Doe v. Cassidy, 9 Ind., 63, 66.

But the executor or administrator may bind himself by an express and voluntary covenant collateral with his official act,* and, where he chooses to add to the ordinary obligation of an administrator's deed a personal covenant of his own, the better to assure the conveyance, he will be held personally to respond to the full scope of the covenant.† Such a covenant is not within the scope of his official duty or authority, which he cannot enlarge by any act of his own; hence, the estate in such case is not bound, but only himself personally.‡ It has been held, that where an administratrix inserted a covenant in her deed of sale in which she was not named as administratrix, although so named in the forepart of the deed, and her title suffixed to her signature, it was *prima facie* her personal covenant.§ An administrator, however, who came into possession of land by the foreclosure of a mortgage to his intestate, and sold the same without license from the probate court, was held not liable in an action on his covenant of good right to convey, because the heirs had accepted the purchase-money.||

The deed of an executor or administrator should show upon its face the authority under which it was given with sufficient

* *Kauffelt v. Leber*, 7 Watts & S., 93, 97 (where the executor had executed a bond to indemnify the purchaser against outstanding incumbrance or defect in the title, and was held liable thereunder).

† *Coe v. Talcott*, 5 Day, 88, 92.

‡ *Brown v. Van Duzee*, 44 Vt., 529, 533; *Prouty v. Mather*, 49 Vt., 415, 425; *Mason v. Ham*, 36 Me., 573; *Dunlap v. Robinson*, 12 Ohio Stat., 531, 533; *Godley v. Taylor*, 3 Dev., 178, 179. And where in such case the purchaser, with a covenant of warranty in the administrator's deed, although expressed to be made by the administrator in his representative character, is evicted, he is personally liable, and the measure of damages is the purchase-money and interest, with the cost of the suit by which he was evicted, not including the money paid for the assignment of a mortgage, of which he had notice, nor for the release of the widow's dower: *Sumner v. Williams*, 8 Mass., 162, 220 *et seq.* So, an administrator cannot, under an order to sell, describing the lands to be sold, bind the estate by a covenant for the quiet enjoyment by the purchaser of an easement in other lands of the decedent not ordered to be sold, unless such easement was in law already an appurtenance to the land sold: *Mabie v. Matteson*, 17 Wis., 1, 7.

§ *Lockwood v. Gibson*, 12 Ohio Stat., 526, 529.

|| The court intimated, also, that he would not be liable although the heirs had not received the purchase-money, the administrator having the right under the statute to convey: *Baldwin v. Timmins*, 3 Gray, 302.

certainty to enable the act done to be traced to the authority vested in him;* but it is not necessary that the grounds or reasons upon which the court proceeded in making the order of sale be specified, if the legal necessity to sell appear.† So, it was held that the deed need not recite the authority by which it is given, if it be referred to and the administrator describe himself as such,‡ that it is good without reciting the sale was by auction, or that the grantee was the highest bidder; and it is not necessary that the deed be signed by the administrator, if the capacity in which he sells appears in any part of it.§ Recitals in a deed are said to be not of the essence, but only of the form of the conveyance; a purchaser is entitled to the recitals required by the statute, but their omission does not vitiate the deed.||

An administrator's sale passes no title until a deed is executed¶ and delivered;** but where a sale is otherwise complete, equity will compel the delivery of a deed and the payment of the purchase-money,†† or the probate court may compel its execution in conformity with a sale made under its order and duly confirmed.‡‡ Delay in the delivery of the deed beyond the time specified in the terms of sale, in consequence of objections made to the confirmation of the sale, does not release the purchaser,§§ and when made and delivered, it relates back to the confirmation of the sale, and confers the same title as if it had been executed immediately.|||| It may be made to an assignee of the original purchaser, or to another person with his consent.¶¶

Where there are several executors or administrators, the deed should be made by them all; but if a trust is executed by one of several joint executors, with the consent of the others, or which is subsequently ratified by the others, the act of the single exco-

* In the absence of such recital the authority cannot be supplied: *Lockwood v. Sturdevant*, 6 Conn., 373, 386.

† *Watson v. Watson*, 10 Conn., 77, 87. † *Langdon v. Strong*, 2 Vt., 234, 262.

‡ *Kingsbury v. Wild*, 3 N. H., 30.

§ *Stryker v. Vanderbilt*, 27 N. J. L., 68, 71; *Thomas v. Le Baron*, 8 Metc., 355; *Jones v. Taylor*, 7 Texas, 240; *Allison v. Kurtz*, 2 Watts, 185, 189.

¶ *Wohlien v. Speck*, 18 Mo., 561.

** *Jelks v. Barrett*, 52 Miss., 315.

†† *Ibid.*, 324.

‡‡ *Estate of Lewis*, 39 Cal., 306, 309.

§§ *Robb v. Mann*, 11 Penn. Stat., 300, 306.

|||| *Bellows v. McGinnis*, 17 Ind., 64, 66.

¶¶ *Ewing v. Higbee*, 7 Ohio, 198, 204; *Halleck v. Guy*, 9 Cal., 181, 196.

utor is binding in equity.* An executor or administrator cannot make a deed by attorney;† and whether an administrator *de bonis non* can make a deed to land sold by his predecessor, is held differently in different States, depending upon the authority ascribed to them by the policy of the law.‡

* *Giddings v. Butler*, 47 Texas, 535, 544.

† *Gridley v. Phillips*, 5 Kan., 349, 353.

‡ Affirmed in Illinois: *Baker v. Bradsbury*, 23 Ill., 632, 633. Denied in Mississippi: *Davis v. Brandon*, 1 How. (Miss.), 154. Doubted in Missouri: *Long v. The Joplin Mining and Smelting Co.*, 68 Mo., 422, 427; *Grayson v. Weddle*, 63 Mo., 523, 539.

INDEX.

	PAGE
ABATEMENT.	
rule of common law, etc.,	133
how changed by statute,	133, 134
ACTION.	
object of the real action,	22, 27
to recover land,	31
strict formal rules abolished,	32
blending of, preserves both law and equity,	39
change of form not a change of principle,	39
for mesne profits and damages,	119
complaint as substitute for declaration,	33
(See COMPLAINT.)	
form of complaint (note),	34
when cause of action accrues,	271
to remove a cloud on title,	590, 312
will not lie when deed void on its face,	313
test, when a cause of action accrues,	200
(See DISABILITIES; LIMITATIONS; PRESUMPTIONS.)	
ADMISSIONS. (See BOUNDARY; ESTOPPEL),	
effect of, to establish a trust,	491-493
AFFIRMATIVE RELIEF. (See PLEADINGS AND ANSWER),	
ALLODIAL. (See EJECTMENT.)	
defined,	19, 20
ALLUVION. (See BOUNDARY.)	
defined,	253
ANSWER.	
supplemental, when necessary,	48
equitable defence must be pleaded,	44, 116
affirmative relief, when,	43
effect of <i>plea</i> in old action of ejectment,	32, 41
effect of certain denials,	42, 115
effect of general issue, etc.,	42
possession must be admitted or denied,	43
making new parties in prayer for affirmative relief,	44
must respond to material allegations,	86, 115
(See NEW YORK CODE DECISIONS),	113-118

ASSIGNMENT. (*See* DOWER.)

- widow has no seisin until dower assigned, 672
 dower assigned by metes and bounds, 713, 721

AUXILIARY RELIEF. (*See* INJUNCTIONS, RECEIVERS, ETC.), 108

- the practice and holdings of the courts, 108-112
 rule as to mere trespass, 109, 110, 111
 rule as to mines, timber, and the like, 109
 effect of insolvency, 109

BARGAIN AND SALE. (*See* PURCHASE DEED, ESTOPPEL, ETC.), . . . 173

- effect of statute of uses on same, 179, 184, 174, 401, 491

BEGINNING CORNER. (*See* BOUNDARY.)BIDDING. (*See* JUDICIAL SALES.)

- re-opening of, 335, 336, 337

BONA FIDE. (*See* PURCHASER.)

BOUNDARY.

- definition of, 209, 210
 rules of construction, 210
 question of law and fact, 210, 240
 rule for fitting description, 211, 212, 213
 beginning corner, 213, 214, 223, 218 (note), 230
 description must have beginning corner, 214
 rules for establishing by *reputation and hearsay*, 214-219
 qualifications of this rule, 219, 220, 221, 238
 declaration of deceased persons, 219, 221
 must have been *ante litam motam*, 219
 monuments made by the parties, 211
 proof of particular facts, 218, 219, 221 (note), 222
calls by adjacent proprietors, 222, 223
 reputation and hearsay distinguished, 223, 224, 225, 238
Tate v. Southard discussed, 216
 witnesses and experts, 213
 description is conclusive as to *quantity*, 210
 plat of survey may explain, 221
 party offering deed takes the burden, 213
 acts, conduct and admissions as to, 226, 237
 special agreements in *parol* when line is *doubtful*, 226, 227, 233
 English doctrine as to, 227, 228 (note)
marked lines *not* called for—rule discussed, 228-230
 reference to other deeds, patents or plats, 231
 ambiguity in deeds and patents, 231, 232
 effect of *conduct*, 232, 233 (note)
extrinsic evidence to explain *calls*, 233
 imperfect description, 239
 kinds of evidence admissible in, 240
 (*See* COLOR OF TITLE AND LIMITATIONS.)
 uncertainty of description, 233, 234

BOUNDARY (*continued*):

"intent" gathered from the call of the instrument,	234, 235
controlling calls in deeds or patents,	235, 238, 237
construction of certain calls,	238, 239, 240
the rule when descriptions conflict,	234, 237
usages of the parties,	234
when a line may be <i>deflected</i> ,	234, 235
when calls for stakes <i>alone</i> insufficient,	238
calls for course and distance controlled, how,	238, 237
effect of declaration of party in possession,	226
lands bounded by sea or navigable stream,	241-246
sea-shore defined,	244-246
ownership in the shore,	245
navigable river defined and test of,	246, 247
the American doctrine,	247-250
civil and common law as to "navigability,"	246, 247
riparian owners,	247
difference between riparian owner and grantee of bed of stream,	250
beds of streams <i>not navigable</i> subject to entry,	250, 251
as to lakes and ponds,	252
in respect to islands,	252
the rights as to alluvion,	253
<i>alluvion</i> defined,	253
<i>reliction</i> defined,	254
meaning of phrase, " <i>bank of river—bank of stream</i> ,"	254
on roads, streets, and walls,	254, 255, 256
see cited cases in various States,	240-246

CALIFORNIA.

the form of complaint used,	34 (note)
conquest of, by the United States,	163
board of commissioners to settle titles,	163
cases cited showing controversies on land titles,	163, 164
mining claims in same,	161

CASUAL EJECTOR. (*See EJECTMENT*), 24, 25CALLS. (*See BOUNDARY*), 235, 236

legal construction of (New York cases),	238-240
---	---------

CHAMPERTY AND MAINTENANCE, 188, 189, 190

does not apply, when,	189
character of possession necessary,	189
does not apply to execution and judicial sales,	320, 323

CLAIMANT.

the technical term for plaintiff,	83 (note)
---	-----------

CODE.

New York decisions under,	113
(<i>See PRACTICE AND TRIAL</i> .)	
Tennessee code (15 and 16 Vict.),	86, 87, 97

CODE (*continued*):

North Carolina code,	87, 97
effect of legislative changes discussed,	172, 173
result of the code practice on pleading,	43
legislative changes in different States,	28-31
old and new systems compared,	31, 32-38
complaint under code of California,	34 (note)
same under English Procedure Act,	28 (note)
provisions of English Procedure Act (Act of 1852),	96, 104, 105 (note)
Tennessee code as substituted for Act of 1819,	262
New York statute defining possession,	290
docketing judgment in North Carolina and other States,	307, 308
effect of code procedure on equity jurisdiction,	500-505
"The Supreme Court of Judicature Act," 36 and 37 Vict., ch. 66,	502
tendency of the code system to enlarge equity jurisdiction,	500, 501, 503

COLOR OF TITLE. (*See* LIMITATIONS.)

not defined in all the States,	264, 265
holding under color of title,	280
what is color of title?	282-285

COMPLAINT.

form of,	34
as substitute for declaration,	33
sufficiency of,	33, 34, 35
what necessary to aver,	33-37
when several defendants,	40
by co-tenant,	40
joinder of claim for damages and <i>mesne</i> profits,	41
each cause must be pleaded,	41
must be in concise language,	31
muniments of title need not be set out,	38
declaration on legal title will not support equitable,	38
contains elements of a bill in equity, when,	38, 39
effect of blending law and equity,	39
title must be truly stated,	39
reasons for alleging fraud discussed,	313, 314

CONDUCT.

effect of, as to boundary,	232, 233
estoppel by conduct. (<i>See</i> ESTOPPEL),	371, 372
effect of, to raise a trust,	504

CONFISCATION.

the acts of, discussed,	339, 340, 723
effect of, on inchoate dower,	723

CONGRESS.

citation of cases as to fraud, mistake, misrepresentations, <i>caveat emptor</i> , failure of title, execution, and judicial sale, in the matter of L. Madison Day,	341-367
pre-emption laws by Congress,	162

CONGRESS (*continued*):

board of commissioners in reference to California land,	163
act of erecting Louisiana into two territories,	164
acts in reference to land titles in Louisiana and Florida,	164
resolution of Confederation Congress (10th Oct., 1780),	169
resolution in regard to Texas,	170
ordinance in reference to territory northwest of the Ohio River, . .	170

CORPORATIONS. (*See RAILROADS.*)

when municipal corporation may maintain ejectment,	94
--	----

CROPS. (*See GROWING CROPS; LAW IN RELATION TO CROPS*), . 63 (note)

party recovering in ejectment entitled to crop,	63
but sheriff cannot take fodder, etc., stacked and stored before writ issues,	63
as between vendor and vendee, mortgagor and mortgagee, etc., . .	63-82 (note)
growing crop passes by the deed in the absence of exception, . .	187
this exception may be shown by parol evidence,	187
meaning of the term. (<i>See EMBLEMENTS</i>),	625
go to the dowress, when,	722

CONSIDERATION. (*See DEED*), 179-186

effect of recital of same in deed,	206
remedies in case of failure of title in judicial sales, etc., . . .	341-367
valuable and good considerations,	180, 458-465
against public policy,	184-185
need not be expressed, sufficient if it exists,	185
the real consideration must be averred,	185
when parol admissible to show other considerations,	186, 507-510
recital of, considered a receipt, and may be explained,	186

(*See BARGAIN AND SALE, AND STATUTE OF USES.*)

when consideration must be paid. (<i>See PURCHASER</i>),	467
valuable consideration a question for the court,	473
good consideration necessary in covenant to stand beised, etc., . .	181
effect of, to produce resultant trust,	505, 506
effect of nominal consideration,	507
marriage is a valuable consideration,	183, 591-598
what consideration will support marriage settlements,	591-598
when inchoate dower not a sufficient consideration,	662-669, 672

CONTRACT. (*See SEPARATE ESTATE; SETTLEMENTS; FRAUD.*)

effect of post-nuptial contracts,	595-600
when affected by fraud,	597-598

CONTRIBUTION.

widow must contribute, when,	657
--------------------------------------	-----

CONVERSION—EQUITABLE.

of the wife's realty by operation of law,	535
equitable conversion, the doctrine explained,	535-538

CONVEYANCE. (*See* DEED.)

effect of voluntary conveyance,	595, 598
when affected by 13 and 27 Eliz.,	595-597
mode of, in American States,	640, 641
dower attaches to defective conveyance of husband,	708

COPARTNERSHIP.

lands bought with partnership funds, how liable,	659, 660
when dower attaches,	660

COVENANT.

to stand seised,	181
for quiet enjoyment,	389
(<i>See</i> ESTOPPEL),	380-389
nature and defects of old action of,	21-23
not necessary in bargain and sale to work estoppel,	390, 391
the heir bound by, when,	396
effect of extinguishment,	389
is limited in its extent to the premises granted,	386
effect of release or quit-claim on estoppel,	386
effect of, by administrator, trustee, etc.,	387
as an estoppel when no title passes,	387
nature of the covenant of warranty,	385
not personal, must run with the land,	385
origin of the "covenant real,"	381
not binding if the deed is imperfect,	385
feme covert not liable on, when,	403
of the husband not binding,	403

CREDITOR.

right of subsequent creditor under 13 Eliz.,	595-597
may become party to application for dower, when,	687-690
contest between judgment creditors. (<i>See</i> LIEN),	310

CURTESY.

tenancy by, defined,	613
legislation in regard to,	613-617
husband entitled to, out of "separate estate," when,	614-616
effect of New York statute discussed,	616, 620

DEALINGS. (*See* CONVEYANCES, AND DEALINGS BETWEEN HUSBAND AND WIFE.)

587

DEBTOR.

estopped to deny title, when,	320
---	-----

DECLARATION. (*See* EJECTMENT; BOUNDARY.)

form of, in ejectment,	26
under Procedure Act,	28
of deceased persons, (<i>See</i> REPUTATION AND HEARSAY),	224-228
declarant must be without interest,	228 (note)
not admissible as a narrative of past facts,	228

DECLARATION (*continued*):

in disparagement of title— <i>res gestæ</i> ,	225, 226
of bargainor who remains in possession,	227 (note)
English cases cited,	227, 228 (note)
of an express trust. (<i>See EVIDENCE; TRUST</i>),	484-488, 492
declarations and admissions to raise a trust by implication,	491, 492, 493
effect of a declaration of trust when legal title passes,	486, 491
a trust must be declared at the time of the conveyance,	505
what declarations admissible to prove marriage,	686, 687

DEED.

different from common-law conveyances,	173
purchase deed,	173, 179
mortgage deed,	173
bargain and sale defined,	175
before statute of uses,	175
effective, when,	175
what it must contain,	175
the word heirs essential, when,	175, 176
feudal origin of the word "heirs,"	176
form of purchase deed,	176, 177
parties to deed,	177, 178
deed by infants, when not estopped,	178
consideration, when necessary,	179, 183
effect of statute of uses,	179, 180, 181, 182-186
marriage a consideration,	183, 184
when void,	178, 184, 185, 194
what passes by deed. (<i>See GROWING CROPS</i>),	187
reservations and exceptions defined,	188
when void for champerty and maintenance,	188-190
other requisites of,	177-190
defeasance and condition,	191-193
what necessary to pass freehold estate,	192
takes effect from delivery,	191
mode of construing,	181
effect of fraud in court of law,	193, 194
effect of recitals. (<i>See ESTOPPEL</i>),	383, 429, 430, 431, 432
estate conferred by unregistered deed,	444
when presumed,	201
may be disregarded for fraud, how,	193
absolute, may be shown to be a mortgage,	195
parol evidence employed to show same,	195, 198
what descriptions necessary—abuttals not necessary,	288
sheriff's deed. (<i>See EXECUTION SALE</i>).	
quit-claim deed, effect of,	386, 387, 384
trust deed, nature and effect of,	495
deed founded on meritorious consideration void as to subsequent purchaser,	596
American rule compared with the English rule,	596, 597
when effectual to release dower,	703, 704

DEFENCE. (*See ANSWER.*)

equitable defence,	43
equitable not admissible, when,	39
equitable defence must be pleaded,	44

DEMURRER,	49
by innocent purchaser, when,	471, 472

DISABILITIES. (*See FEME COVERT; MARRIED WOMEN; ESTOPPEL, ETC.*)

cumulative, not allowed,	294
must exist when right of action accrues,	294, 295
rule when several exist together,	294
effect of the disability of one tenant in common,	293
(<i>See LIMITATIONS.</i>)	
rule as to joint owners of personal property,	293, 294
wife must plead disabilities in apt time,	612

DOWER.

estate at common law defined,	629, 630
changes in the several States, effect of,	630, 636, 645, 664
tenant in dower entitled to emblements, etc.,	624
English dower act explained,	637, 649
reasons for the origin of the estate,	630, 631
its effect upon alienation,	630, 631
preferred over claims of creditors,	632
marriage essential to dower,	632
what property subject to,	633, 634
how applied as to mines and quarries,	633, 634
when husband has <i>mining</i> interest only,	634
rule as to wild lands discussed,	635-637
tenant in dower liable for waste, when,	626, 633, 636
wife dowable of an equitable estate,	637, 643-649
tendency of legislation to enlarge,	637, 638
how formerly defeated,	638
what estate subject to dower,	638
what seisin of the husband necessary,	639, 640
mode of conveyancing in American States,	640
allowed, though deed not registered, when,	641, 642
widow stands as neither creditor nor purchaser,	642
exoneration to pay incumbrances,	643
nature of the trust to which dower attaches,	646-649
change of the law in District of Columbia,	653, 649
statutes conferring dower in trust estate, not uniform,	649
right of, in case of equitable conversion,	649
dower in case of election,	650
in mortgaged estates,	650, 651
wife of mortgagee not entitled to,	651
widow of mortgagor can redeem,	652
how, when mortgagee obtains the equity of redemption,	652, 653
rights of the widow to be reimbursed on redemption,	653
effect of foreclosure and sale during life of husband,	654, 658
wife should be made party to suit for foreclosure,	655, 656
wife dowable of the surplus,	654
widow can compel personal estate in exoneration of,	658
effect of the statute of uses on dower,	644

DOWER (*continued*):

inchoate dower is protected,	655
dowress must contribute, when,	657
right of, subordinate to vendor's lien,	658
in lands held in copartnership,	659
in lands appropriated to public use, not allowed,	661
inchoate right of, at common law,	662-672
not subject to legislative change,	663
statutory dower discussed,	663-672
effect of legislation as to after-acquired lands,	664
other kinds of dower defined,	667
effect of enlargement of, as affects husband's rights,	667-669
diversities of opinions,	669-672
nature of, before assignment,	672
governed by the law of the place where husband died,	672
status of the widow before assignment of,	672
legislation must be prospective only,	662-669
widow entitled to one-third in severalty,	673
boundary, how determined,	673
not subject to levy and sale before assignment,	673
widow's quarantine explained,	673-676
assignment according to common right,	676
mode of ascertaining the proportion of the widow,	676
out of rents and profits, when,	676-680
rule in the different States,	677
in the case of mines, etc.,	680
sum in lieu of, decreed when,	680
provision for widow where land is sold,	681, 682
gross sum in lieu of dower,	682
remedies to recover,	682-699
equity courts have jurisdiction, etc.,	683
parties in suit for dower,	683, 684, 687, 688, 690
heirs of the husband not necessary parties, when,	683
in equitable estates, modes of enforcing,	684, 687
summary proceedings for,	685
evidence necessary to sustain,	686, 687
marriage, how proven,	686
when necessary to show time of marriage,	687
exceptions to the admeasurement of,	688
proof of death of the husband,	690
estoppel of those claiming under husband,	691
when widow is estopped from regular assignment,	694
effect of divorce, adultery, etc.,	696, 697
devises in lieu of dower,	697
election by widow discussed,	698, 699
jointure a bar to dower, discussed,	700-702
wife may release dower,	702
common-law dower abolished in England, when,	702
words necessary to release dower,	703, 704
dower restored if husband's deed be avoided,	707
effect of defective conveyance of the husband,	708
how affected by limitation acts,	709-712

DOWER (*continued*):

statutory changes in this regard,	710-712
assignment by metes and bounds as against heirs,	713
widow entitled to share of improvements made by heir,	714
rule different as to alienee of husband,	715, 716
alienee must make plea,	716
widow entitled to increased value from extrinsic causes,	716, 717
widow's right to mesne profits,	719
deterioration in hands of alienee,	718
remedy of heir against excessive assignment,	720, 721
when the widow is evicted,	721
estate after assignment—qualities, etc.,	721-723
forfeiture of dower—waste, etc.,	723, 724
effect of sale for taxes on inchoate right of,	726

EASEMENT.

passes by deed as appendant or appurtenant to land,	187
public easement may be the subject of ejectment,	94

EJECTMENT.

history of the action,	1-31
form of declaration in,	26
changes in England and America,	27
consent rule,	26
peculiarities of the action. (<i>See ACTION TO RECOVER LAND</i>),	23
where and when adopted,	27
present English law of,	28
against the United States. (<i>See PARTIES</i> .)	
who may bring ejectment,	97, 114
plaintiff must show what,	98, 147, 161
need not deraign title, when,	100, 101, 102
ejectment bill,	112
as against a mortgagee,	114
by husband and wife,	114
when wife may sue alone,	114
by joint plaintiffs,	114
for breach of condition subsequent,	114
distinct titles cannot be joined,	114
for what ejectment lies,	115
what necessary to maintain,	87, 98, 115, 147, 161, 444
who may defend. (<i>See PARTIES</i>),	45, 46, 95, 96, 118
the action is local. (<i>See MESNE PROFITS, DAMAGES, ETC.</i>)	
preemption rights discussed,	161, 162
(<i>See cases cited</i>),	240
English practice, as to who may be admitted to defend	96 (note)
what tried in ejectment,	35
judgment in ejectment,	36, 51-60
by infants,	40
(<i>See JUDGMENT.</i>)	
(<i>See decisions under New York Code</i>),	113-118
(<i>See TRIAL, PRACTICE, EVIDENCE</i>),	83-112
party claiming title may be sued, when,	86, 87
cannot join distinct parcels in possession of several defendants,	88
by wife against the husband, when,	602, 603

ELECTION.

by widow. (*See DOWER*), 698

EMBLEMENTS. (*See TENANTS FOR LIFE; GROWING CROPS.*)

go to the personal representative of tenant by curtesy and
dower, 522, 624, 722
(*See RENTS AND PROFITS.*)
the law in relation to crops—*fructus industriales* (Note), 63-82
term defined, and the reason for allowing the same, 625
effect of marriage of female tenant for life, 625

EMPLOYEES.

may be sued in ejectment, when, 88, 94
case, *Carr v. United States*, cited and commented on, 88, 94
general rule in such cases, 88

ENROLLMENT.

statute of, 174, 183
registration acts have similar effect, 174, 175

ENTRY. (*See GRANT; FIRST LINK.*)

foundation of grants, 149, 150, 156
lapse of entries, 157
legislative extensions discussed, 157, 158
requisites of an entry, 158
vague entry, effect of, 158, 159
effect of *surrey*, 158, 159, 166
when considered a mere equity, 150, 161
beds of unnavigable streams subject to, 250, 251
entry under color of title. (*See LIMITATIONS.*)
widow no right of entry before dower is assigned, 672

EQUITY. (*See ESTATE.*)

equitable defense, 44
equitable title must be pleaded, 38
effect of, under procedure acts, 43, 111
equitable estoppel defined, 208, 368, 370, 379, 380
decrees in equity, how enforced, 304
equity courts take no jurisdiction to enjoin a mere *trespass*, 109
power to grant auxiliary relief, 108-112
court of equity comes in aid of the court of law, 109
equitable estate subject to execution, when, 321, 322
mixed trust not subject to execution, 322
effect of recent legislation, as auxiliary relief, 111
land held under unregistered deed subject to execution, 473
rule when equities are equal, 449
law prevails when equities equal, 449
the doctrine of priorities discussed, 449-453
(*See PRIORITIES.*)
interest of mortgagee equitable, when, 452
when equities are *unequal*, 455, 456
equitable estoppel discussed, 367

EQUITY (*continued*):

effect of code procedure on equity jurisdiction,	500-503
effect of English "Supreme Court of Judicature Act,"	502
courts of, bound by statute of limitations,	515-518
courts of equity enforce trusts,	521 (note)
nature of equitable conversions,	536-538
equitable title draws to it legal title, when,	538
how equity treats the deed from husband to wife,	601
when a settlement on wife will be supported,	601
equity controls the statutory separate estate,	604

(See SEPARATE ESTATE.)

ESTATE.

how set forth in complaint,	36
(See BARGAIN AND SALE.)	
equitable estate subject to execution. (See EXECUTION SALES.)	
kind of estate conferred by unregistered deed,	444
legal and equitable, compared. (See TRUSTS),	473
estates for life—rights and liabilities of tenant,	624

ESTOPPEL. (See JUDGMENT; PRESUMPTIONS OF LAW.)

definition,	205, 209, 368, 370, 380
<i>feme covert</i> not bound, when,	206
old rule of, in equity,	29
tenant not bound by, when,	100, 207
by practice of the court,	101, 102
when tenant in common not estopped,	101
as to defendant in execution,	101, 320, 321
State nor government not bound by, when,	163, 207
when infant not estopped,	178
who bound by,	205, 206, 208
grantor acting officially, not bound by,	206
recital of consideration money,	208
when defendant in ejectment not estopped,	207
by recognition of <i>lines</i> ,	233
difference between law and equity as to recital of consideration money,	208
rule in California,	321
determines the rights—not a rule of evidence,	367-370
legal and equitable, compared,	367, 368
equitable estoppel defined,	368, 370
must be mutual,	205, 206 (note)
effect of recitals in deed,	205, 208, 383, 384
does not bind strangers or those claiming adverse title,	206
elements necessary to constitute equitable,	371
fraud not an essential element, when,	371, 372
by <i>conduct</i> ,	369, 371, 372, 373
fraud, necessary when land title affected,	373, 374, 376
foundation and reasons of the doctrine,	377, 378
limits of the doctrine,	379
why called equitable estoppel,	379, 380
<i>title</i> by estoppel, legal origin,	380
at common law, discussed,	380-382

ESTOPPEL (*continued*):

effect of, upon after-acquired title,	380, 382, 384, 401
contract of warranty,	380, 381
the deed must be voluntary,	382
cases when warranty unnecessary,	383, 384
nature of the covenant,	385-389
owner not estopped by imperfect instrument, when,	386
effect of the covenant, limited when,	386
when guardians, trustees, administrators, etc., bound by,	387
effect of quit-claim,	386, 387
as to covenant for quiet enjoyment,	389
tenant in common, how affected by,	101, 389
no wider than terms of deed,	384
bargain and sale as estoppel, when,	384, 390, 401
conflict of opinion as to necessity of covenants,	390-392
holding of United States courts,	390
covenants must be positive and certain,	392
effect of deed from heir expectant,	392, 393
how construed by courts of equity,	393
when no interest passes, estoppel arises,	394
converse of this proposition discussed,	394-396
the question one of intention,	396
how the heir is bound by the covenants,	396
rule of the common law as to assets descending,	396, 397
when opposed by <i>bona fide</i> purchaser,	399
by common-law conveyances and existing modes compared,	398-401
estoppel against an estoppel,	392, 393 (note)
as between bargainor and bargainee when in <i>pari delicto</i> ,	401
as to married women,	421, 422, 609
(<i>See MARRIED WOMEN</i>),	402
acts and conduct to create a trust,	492
effect of Married Women's Acts on doctrine of,	600-612
as to those claiming under husband,	691
as between vendor and vendee,	692
when widow estopped from claiming dower,	694-703

ESTOVERS.

defined,	624
life-tenant entitled to,	624

EVIDENCE.

what claimant must produce in ejectment,	83, 84, 85
in reply to defense,	84
must show the defendant in possession,	85
parol evidence. (<i>See ESTOPPEL; BOUNDARY.</i>)	
parol to show consideration of deed,	186, 187
parol to show title adjudicated,	58
copy of deed, when,	198
parol defeasance cannot affect title,	193
parol to show a deed a mortgage,	195-198
parol interlocutions when merged in writings,	196
parol in case of mistake, fraud, etc.,	196

EVIDENCE (*continued*):

as to the variation of the needle,	210
parol as to agreement when lines doubtful,	226-234
opinion of Judge Henderson,	229
parol as to marked lines not called for,	228
parol, when to show beginning corner,	230, 231
to explain latent ambiguity,	231, 232, 233
parol to establish equitable estoppel,	369
extent of, and varied character in ejectment,	107
copy of instrument not evidence when registration is defective,	433
(See cited cases,—N. Y., Tenn., Ill., and others),	240
(See LIMITATION; POSSESSION.)	
parol, to show <i>exception</i> in a deed, when,	187
parol, to establish trust. (See TRUSTS),	481-492
parol, to establish a use at common law,	486
effect of declarations, acts, etc., to create trust,	491-493
<i>prima facie</i> evidence defined,	83
effect of evidence in rebuttal,	84
effect of parol, to show breach of trust,	539
declarations of trustee competent,	539, 540
parol, to establish charge on separate estate,	578-586
parol, agreement before marriage, etc.,	592

EVICTION. (See EJECTMENT.)

remedy for widow when evicted,	721
--	-----

EXECUTION SALES.

history of,	302
difference between <i>eligit</i> , <i>extent</i> , etc.,	303
requirements and duty of sheriff,	304
decrees in equity, how enforced,	304
choses in action, how reached under code,	304
void sales pass no title, irregularities will not vitiate,	304, 315, 316
effect of stay laws, valuation, etc.,	304, 305
sheriff's deed, its effect by relation,	305, 306, 307
difference between execution and judicial sales,	305
execution not a lien before statute West. 2,	305
form of execution from U. S. courts,	305
sheriff may sue for purchase-money,	305, 329
sheriff's deed must make the lien effectual,	306
extent of the doctrine of relation,	307, 309
the reason discussed,	308
effect of record in certain States,	309
effect of sheriff's deed as to title,	311
<i>careat emptor</i> applies to,	311
effect of void judgment as to purchaser,	311
when cloud on title may be removed,	311
what necessary to support sheriff's deed,	314, 315
effect of recitals in sheriff's deed,	314, 315
purchaser has an equity before obtaining deed,	315
defendant must have notice of sale,	315
effect of reversal of judgment as to purchaser,	316-318

EXECUTION SALES (*continued*):

rule when plaintiff in judgment receives the proceeds,	318, 317
effect of as to lien-holders who purchase,	317
levy on lands—reasons, etc.,	318, 319
what necessary to render proceedings complete,	318, 319
description necessary in levy,	319
levy may be read to contradict the deed,	319
sheriff's deed does not authorize summary remedy,	319
debtor holding over estopped to deny title,	320
champerty does not apply,	320
grantee under sheriff's deed must deraign title, when,	321
what purchaser gets at sale,	321
equitable estate subject to,	321, 322
mixed trusts not subject to levy,	322
<i>caveat emptor</i> discussed,	323, 324
can creditor be innocent purchaser?,	325, 326
officer required to act with fairness,	326
reciprocal obligation between sheriff and purchaser,	327
railroad franchise subject to, by statute,	327
sale of franchise does not destroy corporate existence,	327
report of Cong. Comm. <i>in re</i> J. P. Benjamin,	341-367
when purchaser is protected from an unrecorded deed,	326
when protected under registration acts,	468, 469, 470

EXECUTORS AND ADMINISTRATORS.

liability as trustees,	515
(See SALE OF LANDS TO PAY DEBTS OF DECEASED PERSONS.)	

FEME COVERT. (*See* MARRIED WOMEN.)

not estopped by covenants at common law,	206
rule changed by "Married Women's Acts,"	206
when effected by estoppel,	384
must join in the covenants—signing names not sufficient,	177, 178

FEUDS. (*See* TENURE.)

definition,	19
modes of granting,	21
remedies, etc.,	21

FICTIONS. (*See* EJECTMENT.)

abolished,	56
----------------------	----

FORMS. (*See* CODE, COMPLAINT, ANSWER.)

of declaration in ejectment,	26 (note)
of declaration under 15 and 16 Vict.,	28 (note)
of complaint as substitute for declaration,	33, 34 (note)
strict formal rules abolished,	32, 39
the legislative changes have affected "forms" more than "substance,"	32, 501
form and requisites of wife's deed,	177
no formal writing necessary to declare a trust,	492, 496
form of certificate of wife's acknowledgment,	525-528

FRAUD.

statute of frauds,	196
concurrent jurisdiction, when,	194, 195, 313
when parol evidence as to boundary not within the statute of,	126, 127, 233
not an essential element in estoppel by conduct,	371
rule different when land affected by estoppel,	373
when deed may be disregarded in court of law, for,	193, 590
when resort necessary to courts of equity,	193, 194
, (See ESTOPPEL, TRUSTS, ETC.)	
inferred from the nature of certain instruments,	465
when inferred from the face of the instrument,	465
effect of, as to purchasers claiming to be innocent,	471
, (See PURCHASER; NOTICE.)	
effect of statute of—as affects trusts declared,	484, 492
necessary to raise a constructive trust,	509, 510
the doctrine illustrated,	510, 511
effect, in preventing the bar in limitation acts,	518
effect of, in marriage settlements,	592-600
object and effect of statutes 13 and 27 Elizabeth,	588, 596, 597
must enter into and affect the contract,	598
conveyance in fraud of intended husband,	594

GIFT.

party <i>sui juris</i> has power to make voluntary gift,	497
voluntary gift, when void,	597-598
mere voluntary promise will not support a gift,	598

GOOD FAITH. (See FRAUDS; PURCHASER.)

necessary in the defense of <i>bona fide</i> purchaser,	471
---	-----

GOVERNMENT.

must refund money when received without consideration,	341-367
how the public lands are obtained by,	147-150
not bound by estoppel,	163
the United States Government the source of title,	164
power to regulate the public lands,	165
title passes by patent of,	165
want of power in the State legislature,	166
regulations of the Land Office,	167, 168
how, and of whom, title is obtained by,	168
cession of certain lands by the States,	169
the power to admit new States,	170

GRANT. (See "FIRST LINK;" BOUNDARY.)

conveys legal title,	149
how affected in courts of equity,	149
relates to the entry,	149, 156
oldest grant prevails, when,	149
entries discussed,	149, 150
presumption in favor of grants,	150, 151
presumed from lapse of time,	199-205
character of possession to raise presumption,	202-205

GRANT (*continued*):

declared void, <i>how, when, and by whom</i> ,	150-154
exemplification of,	154, 155
exceptions in,	155, 156
reservation in, effect of,	156
nature of the estate conferred by an <i>entry</i> ,	161, 162
the doctrine of relation,	149, 156, 162, 163
cancellation of,	167, 168
recitals, effect of,	171

(See ESTOPPEL as to recitals.)

HEARSAY. (*See* BOUNDARY; EVIDENCE.)

declaration of deceased persons,	219, 221, 225, 226, 227
a summary of the authorities,	225, 226
distinguished from reputation,	223, 224, 225, 238
see note of cited cases on <i>boundary</i> ,	240-246

HEIRS. (*See* DEED; ESTOPPEL.)

the word "heirs" necessary in deed, when,	175, 176
feudal origin of the word "heirs,"	176
heir expectant, effect of his deed,	392, 393
bound by covenants, etc.,	396
rule of the common law as to assets descending,	396, 397
effect of estoppel on his title, legal origin,	390
remedy of, in excessive assignment of dower,	720

HUSBAND AND WIFE. (*See* DISABILITIES; FEME COVERT.)

ejectment by,	114
suit by wife to recover <i>separate estate</i> ,	114
form and requisites of wife's deed,	177
marriage a valuable consideration,	183, 184
improvement on wife's land not allowed,	145
possession by husband and wife, was possession by the husband at com- mon law,	95
when the wife should be made party,	95
effect of statutory change,	95
rights and liabilities of the husband at common law,	521-524
requirements of the common law to pass wife's title,	524, 525
effect of American statutes,	525, 526, 606
requirements as to signing deeds,	527
wife can take by deed, in what way,	529
not compellable to carry out executory contract,	529, 530
cannot convey by attorney, except, etc.,	530
wife not bound by covenant, when,	531, 532
title passes without warranty,	532, 533
her right to convert real estate into personalty,	533, 534
to whom and for what purposes the wife may convey,	532, 533
may mortgage land to secure the debt of the husband,	532
transactions between, closely scrutinized,	534, 535, 589
conversion of wife's realty by operation of law,	535, 536
the doctrine of equitable conversion explained,	536-538
property subject to a trust, unduly changed,	538

HUSBAND AND WIFE (*continued*):

effect of a change of the fund by breach of trust,	539, 540
wife has the same remedy against her husband as against a stranger,	542
coverture no protection to the wife in case of fraud,	531
stands in the position of security to the husband, when,	532
entitled to exoneration in such cases,	532
the effect of a <i>re-conversion</i> ,	537
dealings between, treated as trustee and <i>cestui trust</i> ,	534, 539
wife may become debtor to the husband, when,	579
husband can make voluntary settlement, when,	587-591
effect of conveyance founded on valuable consideration,	588
effect of statutes 13 and 27 Elizabeth,	588, 589, 595, 596
strict common-law rule,	589, 600
husband chargeable as agent, when,	589, 590
post-nuptial and ante-nuptial settlements,	591, 593, 595, 596, 598
contracts between, may be specifically performed, when,	599
effect of the appointment of a trustee,	599
voluntary deed from wife to husband void,	600
different if she acts under a power,	600, 608
husband may make settlement on the wife, when,	600, 601
when equity will not support such settlement,	600, 601
effect of recent statutes on wife's power of disposition,	601, 602, 606, 608
husband acting as agent does not affect her separate estate,	602
wife may sue in her own name, when,	602, 611
rents and profits part of her separate estate,	602
wife's remedy against husband who holds her lands to himself,	602, 603
when lands bought with wife's money,	603, 604
wife may establish a trust, when,	604, 605
wife's bond will not bind her separate estate, when,	604
wife may become security for husband and others,	604, 605
wife not allowed to commit fraud,	605, 612
husband must join in wife's contracts,	605, 606
wife could not devise by will at common law,	606
rule, how changed by statute,	606-608
creation of "sole" and "separate estate" leaves the wife under some disabilities,	608
effect of parol agreement between, as to land,	599
wife may give to the husband,	598
such gifts regarded with suspicion,	598
wife cannot acquire through husband, in fraud of creditors,	612
wife must plead her disability in apt time,	612
statutory enlargement of wife's capacities,	609-612
husband's right to curtesy discussed,	613-623 (note)
husband cannot recover for improvements on wife's land,	623, 624
general effect of the Married Women's Acts,	627, 628
legislature cannot destroy husband's rights,	669

ILLINOIS.

leading cases on boundary,	241, 242, 249
--------------------------------------	---------------

IMPROVEMENTS. (*See MESNE PROFITS AND DAMAGES.*)

payment of incumbrances,	145
------------------------------------	-----

IMPROVEMENTS (*continued*):

by husband on wife's land, not allowed,	145, 623
by mortgage in possession not allowed, when,	145
rule of equity as to co-tenants,	145
by vendee under defective title,	146
income from improvements,	132, 133
strict rule of the common law,	135, 136
Jackson v. Loomis, discussed,	137
legislative changes,	136
rule of the civil law and in equity,	137, 138
<i>bona fide</i> occupant under claim of title,	138
what is <i>bona fide</i> occupancy,	138, 139
exceptions to general rule,	139
constructive notice, effect of, as to,	140
what constitutes improvements,	141
not allowed after ejectment suit brought,	142
made by grantor,	142
basis of valuation of,	142
how pleaded,	142, 143
question of title must be terminated,	143
as to improvements in excess of profits,	143, 144
remainderman not charged with,	144
widow entitled to, as against the heir, when,	714

INFANT.

when not bound by estoppel,	178
must show acts of disaffirmance, when,	178
(See EJECTMENT; DISABILITIES.)	
may assign dower,	675

INJUNCTION. (*See AUXILIARY RELIEF.*)

practice and holdings in regard to auxiliary relief,	108, 112, 115
equity will not enjoin sale under execution, when,	590

ISSUE.

in ejectment,	36, 105
general issue in old action, what,	32
(English practice),	105
what tried in ejectment,	35
proof of, on whom in ejectment,	98, 147, 161, 444

JOINTURE.

as a bar to dower, defined and discussed,	700
---	-----

JUDGMENT.

in ejectment,	36, 53
in real actions,	52, 53
when conclusive as estoppel,	51-57
not conclusive in old action of ejectment,	53
should specify estate,	58
form of, in different States,	59
parol, to show what decided,	58

JUDGMENT (*continued*):

test as to conclusiveness,	52
no estoppel as to after-acquired title,	56
when landlord bound by,	57
reasons for its inconclusiveness,	53
(See EXECUTION SALES.)	
decisions under New York Code,	113-118
judgment-creditor, when a purchaser, etc.,	470
judgment-creditor becomes a "subsequent purchaser" by Registry Acts,	469

JUDICIAL SALES. (*See SALE OF LANDS TO PAY DEBTS.*)

general nature and application of,	328, 329
distinction between judicial and execution sales,	329-331
court the vendor for benefit of all parties,	330
effect of interlocutory decree of sale,	331
rights and liabilities of purchasers at,	331-333
<i>caveat emptor</i> , how understood in,	333-335
court to adjust equities between the parties,	332, 333
re-sale and opening of biddings, discussed,	335-337
English practice,	335, 336
other reasons for setting sale aside,	338
direct and collateral impeachment of decree,	339, 340
when action lies to impeach decree,	340, 341
rights and liabilities of parties when <i>title fails</i> ,	341
report of Congressional Committee in the matter of J. Madison Day,	341-367

KNOWLEDGE. (*See NOTICE.*)LAND. (*See EJECTMENT.*)

how obtained by the United States Government,	147-150
title to land, how affected by <i>estoppels</i> ,	378
(See ESTOPPEL.)	
how obtained by the several States,	147-150
titles unaffected by the feudal tenure,	18-23, 148
how affected by parol trust. (<i>See TRUST.</i>)	

LANDLORD.

right to come in under old action,	45
in default of tenant, another might defend, when,	45
legislative changes,	44, 45
may be joined with tenant as defendant,	87
the term landlord defined. (<i>See PRACTICE</i>),	96, 97 (note)
when tenant may deny landlord's title,	207
English Procedure Act,	96 (note)
(See ESTOPPEL; EJECTMENT.)	

LAPPAGE. (*See LIMITATIONS*), 281

lapping or interference of titles,	295, 296, 301
effect of actual and constructive possession in,	295-301
who has the seisin, and when,	296, 297
junior claimant must have possession of,	296
effect of concurrent and mixed possessions,	296, 297

LAPPAGE (*continued*):

not necessary for the true owner to be in actual possession, when,	288
how to arrest the constructive possession,	298
what possession requisite to arrest constructive possession,	298, 299
holdings in different States,	300, 301

LAW. (*See CODE; PRACTICE; EQUITY.*)

prevails when equities are equal,	449
estate in <i>law</i> and estate in <i>equity</i> . (<i>See TRUSTS</i>),	473
relief from mistake in law, when,	356, 357, 363
fraud cognizable in court of law, when,	193, 194, 502

LEASE. (<i>See FICTITIOUS LEASE</i>)	25
notice to terminate,	105-107

LEGISLATURE.

no power to enlarge dower, as against husband, etc.,	667-669
(<i>See CODE.</i>)	
such laws may operate prospectively, when,	671

LEVY ON LANDS.

the reason for, discussed,	318, 319
what description necessary,	319
may be read to contradict sheriff's deed, when,	319

LIENS. (*See EXECUTION SALES.*)

effect of, by docketed judgment,	305, 306, 308, 324, 326, 469
date of judgment may be shown to show priority of,	306
effect of junior docketed judgment,	310
after-acquired lands bound by,	310
judgment lien not a title,	310
neither <i>jus in re</i> nor <i>jus ad rem</i> ,	310
difference between lien and interest,	325, 326
judgments of Federal courts a lien from <i>teste</i> ,	310
English rule as to,	310
lien of vendor. (<i>See VENDOR; VENDEE</i>),	470
execution not a lien before stat. West. 2,	305
made effectual by sheriff's deed,	306
effect of lien; holder's purchase at execution sale,	317
comparative effect of certain liens,	451, 455, 456
right to dower is an interest, and not a lien,	326
contest between purchase by sheriff's sale and unregistered deed,	326, 468, 469
lien of purchase-money, mortgage over other liens,	470, 471
general judgment lien inferior to that of unregistered deed,	469
lien of vendor superior to right of dower,	658

LINK, IN CHAIN OF TITLE,	149
(<i>See GRANT, DEED, ETC.</i>)	

LIMITATIONS, STATUTES OF.

as to <i>meane profits</i> ,	118, 129, 130
judgment in ejectment not conclusive as to time,	130

LIMITATIONS, STATUTES OF (*continued*):

not applicable to lands of the State or government,	171, 199
effect of, when the State becomes member of trading company,	172
(See PRESUMPTIONS OF LAW.)	
statute of, must be complied with,	202
difference between <i>limitation</i> and <i>prescription</i> ,	200
definition of, and policy,	237
presumption defined,	257
Acts of 21 James I., and 3 and 4 William IV.,	258, 259, 273
changes wrought by 3 and 4 William IV.,	260
other English statutes,	258, 268
twenty years' possession presumed adverse, when,	261
finer and recoveries, effect of 4 Henry VIII.,	261
American statutes of, struggles over the same,	261
North Carolina and Tennessee statutes of, discussed,	261
Tennessee, Act of 1819, construction of the same,	262-265
general nature of American statutes,	264
when title conferred, and when not,	265, 266
construction of, in the several States,	266, 267, 268
construction of 3 and 4 William IV.,	267
character and ingredients of adverse possession,	268, 269, 273
possession must be <i>adverse</i> ,	269
must be <i>intentional</i> and <i>continual</i> ,	270, 290, 291
effect of bare possession,	270
when statute begins to run,	271
holding by <i>mistake</i> , merely,	271
a <i>mere claim</i> not sufficient,	271, 272
disseisin defined,	272
effect of certain acts of ownership,	272
criticism on the <i>wording</i> of certain acts,	267, 268
how applied in case of cumulative disabilities,	294
how applied when several disabilities coexist,	294, 295
how applied when one tenant in common under disability,	293
test of, when cause of action accrues,	200
(See DISABILITIES; ACTIONS.)	
disseisin under feudal system and statute,	273
accompanied by force under feudal system,	273
complete possession in contemplation of law,	274
continued <i>residence</i> not necessary, when,	275
possession must be by actual occupation, etc.,	275
holding of the court, in <i>Lenoir v. South</i> ,	275, 276
rulings in New York and New Hampshire,	277
payment of taxes, etc., indicative of ownership,	277
rulings of United States courts as to <i>adverse</i> possession,	277, 278
wrong-doer confined to <i>possessio pedis</i> , etc.,	278, 279, 285
the rule as to wild lands granted,	279, 288
effect of <i>constructive</i> possession,	274, 280, 286
holding under <i>color of title</i> ,	280
color of title defined,	282, 284, 285
doctrine of color of title discussed,	282-285
effect of color of title,	285-289
color of title and possession must be coexisting,	289, 290

LIMITATIONS, STATUTES OF (*continued*):

qualifications of the rule that possession of a part gives possession of the whole,	288
possession must be marked by definite boundaries,	280, 286
opinion of Smith, C. J. (recent N. C. case),	281
no privity between trespassers,	290
rule as to joint owners of personal property,	293, 294
pleading of the statute,	291-293
how to arrest the running of the statute, by suit, etc.,	290
effect of statute of, upon trust estates,	511
(See TRUSTS.)	
runs against equitable owner as to <i>bona fide</i> purchaser,	512
the relation of trustee and <i>cestui que trust</i> must be subsisting,	513
limitations of the States apply to the United States courts,	515
late English acts of, discussed,	515, 517
do not run until fraud discovered, when,	518-520
the rule different in courts of law,	518-520
effect of, as to right of dower, discussed,	709-712

LIS PENDENS. (*See NOTICE.*)

is constructive notice, when,	444
purchaser from party or privy bound by,	447
reasonable diligence in prosecution of suit to affect <i>bona fide</i> purchaser,	447

MARRIAGE. (*See SETTLEMENTS.*)

is a valuable consideration,	183, 591
marriage settlements,	591, 592-598
effect of, at common law,	521
(See CONSIDERATION.)	
considered in the light of a civil contract,	632
diversity of opinion,	633
actual proof of, necessary when,	633
may be inferred, when,	633, 686
marriage essential to dower,	632
valid according to the law of the place,	672
how proven, in action for dower,	686
causes for divorce discussed,	695-697

MARRIED WOMEN. (*See SETTLEMENT; SEPARATE ESTATE.*)

not bound by estoppel, when,	402
when bound by conduct <i>in pais</i> ,	402, 406, 418, 419, 420
common and statutory laws compared,	402, 403
the doctrine as held in the United States,	403
not estopped by agreement at common law,	404, 405
when liable to action for tort,	405, 406
cannot ratify during coverture,	406
effect of coexisting disabilities,	406
when bound by joint acts with husband,	407, 410-419
not estopped by receipt of consideration, when,	407
frauds by, not favored,	408, 419, 605
when estopped by her contracts,	408, 409, 422
mechanics' lien on wife's realty,	409, 410

MARRIED WOMEN (*continued*) :

when estopped by act of husband, acting as agent, . . .	410, 411, 418, 419
when the contract relates to the separate estate, . . .	411
effect of passive acquiescence, discussed, . . .	412-416-418
cases, <i>Banks v. Lee</i> , and <i>Hicks v. Skinner</i> , discussed, . . .	412-416
dissenting opinion of Judge Bynum in <i>Hicks v. Skinner</i> , . . .	414, 415
diversity of opinions, . . .	415-418
instances when estopped, . . .	421, 422
resultant trust in favor of, . . .	419, 420, 605
power of, to make a will, by statute, . . .	606-608
may act under a power at common law, . . .	608
effect of married women's acts on doctrine of estoppel, . . .	609
statutory changes in several States as to, . . .	610-612

MERGER.

definition of, . . .	653
----------------------	-----

MESNE PROFITS—DAMAGES.

action for, defined, . . .	119, 125, 126
rights of the owner of land, . . .	120
liability for improvements, . . .	120
plaintiff must be in possession, . . .	120, 121
parties, plaintiff and defendant, . . .	121
same in case of death of either party, . . .	121-123
pleadings, joinder of actions, etc., . . .	123
issues which may be involved, discussed, . . .	123-125
practice in Massachusetts and Maine, . . .	125
same in other States. (<i>See NEW YORK CODE PRACTICE</i>), . . .	126
is in the nature of an equitable suit, . . .	126
rule as to co-tenants, . . .	127
for what period recoverable, . . .	127, 128
the usual plea of defendant, . . .	128
judgment in ejectment conclusive, when, . . .	116, 128
complaint must declare for, . . .	125
different in suit for trespass, and use and occupation, . . .	125, 126
interest allowed, when, . . .	117, 131
<i>bona fide</i> purchaser allowed value of improvements, . . .	117
limitations as to actions for, . . .	118
assessed to day of trial, . . .	130, 131
measure of damage, what, . . .	116, 130, 132
demand must be made in complaint, . . .	132
in equity, . . .	133
when administrator may sue for, . . .	129, 134
not recoverable before title accrued, . . .	308
right of dower as to, . . .	719

MINES AND MINERALS.

income from, in action for mesne profits, . . .	133
when passed by grant, . . .	170
when party can recover on mineral claim, . . .	161

MISTAKE. (*See EQUITY.*)

MONUMENTS. (*See* BOUNDARY.)MORTGAGE. (*See* CROPS; IMPROVEMENTS.)

conveys equitable interest, when,	452
successive, how effected by registration,	452
effect of equitable mortgage,	449, 455
effect of purchase-money mortgage,	470, 471
dower allowed in mortgaged estate,	650-656
when the widow may redeem,	652
when wife a proper party in foreclosure suit,	655, 656

NAVIGABILITY.

test of, in America,	247
common-law criterion,	246-249
beds of navigable streams belong to the States,	247
rule of the civil law,	247

NEW YORK.

brief of decision under the code,	113-119
briefs as to boundary,	240-242 (note)
adverse possession defined,	268
rule as to constructive possession,	288
statutory changes as to trust,	494 (note)
construction of married women's acts (1849),	608

NORTH CAROLINA, 87, 97, 126, 179, 182, 190, 193, 195, 197, 202, 203, 204, 205, 212, 214, 217, 223, 224, 229, 230.

holding as to certain calls, in instrument,	238
parol evidence to explain description,	234, 235
effect of code on action of ejectment,	54
construction of sections 61 and 65 of code,	44-50
party in interest must sue in action for land,	32, 33
law in regard to entries,	156-160
limitation acts of 1715 and 1797,	261-264
Lenoir v. South, discussed,	274-277, 284
what constitutes color of title,	283
different limitations as to land,	279 (note)
the rule when plaintiff in judgment is purchaser,	315
rule as to purchaser at execution sales,	324
Burgin v. Burgin, discussed,	332
Edney v. Edney, as to <i>caveat emptor</i> ,	334, 335
Colonial act of 1715 in reference to deeds,	180
statute in regard to <i>lis pendens</i> ,	446
registration acts as to mortgage deeds,	437, 438, 441
constitution of 1868 empowers wife to make will,	607
act restoring common-law dower,	637, 667, 669

NOTICE. (*See* PURCHASER), 423

different kinds, express, implied, or constructive,	424
the distinctions drawn,	424, 425
actual notice not synonymous with actual knowledge,	425
test of sufficiency of express notice,	425

NOTICE (*continued*):

diversity of American decisions,	425, 426
what necessary to constitute actual notice,	428
actual notice a conclusion of fact, may be proven, etc.,	426
proper source of information,	426
knowledge of facts imputed, when,	427
constructive notice explained,	427
by registration conclusive, a presumption of law,	427
by possession a <i>prima facie</i> presumption, when,	427
notice (in the abstract sense), defined,	427
constructive notice defined and explained,	428
registration a notice in law,	429, 436
possession to give notice must be actual, notorious, etc.,	429
qualifications of this rule,	429, 430
by title papers, etc.,	431
recitals in original patent,	431
purchaser holding under deed charged with notice of recitals and references in same,	431, 432
recitals, references, etc., put purchaser upon inquiry,	431, 432
nature of recitals that bind a purchaser,	432
purchaser bound by recitals in sheriff's deed,	432
information obtained by agent,	429
by <i>lis pendens</i> ,	429, 444
reference to other documents put purchaser upon inquiry,	432
deed to give notice must exist,	433
does not operate between the immediate parties,	433
between principal and agent,	433
qualification of the rule,	433-435
the reasons of the rule,	434
variations in American Registry Acts,	436, 437
who affected by registration notice,	437
language of different statutes,	437, 438
requisites of record to give notice,	438, 439, 444
only applies to such instruments as require registration,	438
whether registration excludes other kinds of notice,	440-444
registration same as other species of constructive notice,	443
policy and reasons of the rule,	445
qualifications and peculiarities of the doctrine,	445, 446
statutory changes,	446, 447
how viewed by the courts of United States,	448
purchaser without notice, etc.,	448
exemplified by certain equitable rules. (<i>See EQUITY</i>),	449
does not apply to legal estates,	453, 466, 467
effect of statutes 13 and 27 Elizabeth on common-law conveyances,	453
effect of, on priority of equities,	455, 456
time of notice among conflicting rights,	457, 458, 466
of what notice must consist,	458
concerning <i>bona fide</i> purchaser for value,	458, 459
effect of notice, etc.,	456-464
notice to quit, etc.,	105-107
constructive notice not sufficient to preclude the <i>bona fide</i> occupant from claiming improvements,	140

NOTICE (*continued*):

effect of survey as notice to junior enterer,	159
effect of adverse possession. (<i>See LIMITATIONS.</i>)	
purchaser of <i>after-acquired</i> title without notice,	400
quit-claim deed puts the party on notice,	464
other written instruments that give notice,	465
second purchaser without notice from first purchaser, with notice of unrecorded deed,	469, 470

NULLUM TEMPUS OCCURRIT REGI. (*See LIMITATIONS.*)

OCCUPANCY.

change of, pending action,	118
(<i>See LIMITATIONS.</i>)	

ORAL. (*See EVIDENCE.*)

OUSTER.

question of fact for jury,	51, 103
may be committed by agent,	51
special verdict must find ouster,	51
(<i>See VERDICT as to tenants in common.</i>)	
ouster defined,	103
effect of <i>consent</i> rule under old practice,	40
rule under new English practice,	104
no real ouster in the modern ejectment,	25
what acts amount to ouster,	104, 105
(<i>See ADVERSE POSSESSION.</i>)	

OWNERSHIP. (*See LIMITATIONS; POSSESSION.*)

PARTIES. (*See EJECTMENT.*)

suit in name of,	28, 29
who were proper parties in old action,	44
statutory power to make parties,	44
power of the court as court of equity,	45
when equitable defence,	44
party claiming title may be sued,	86
when the wife is a proper party,	95
who may be admitted to defend,	95
when squatters and employes may be sued,	88-94
when a State or the United States claims property,	88-94
corporations, cities, counties, husband, etc.,	93
several parties; several tracts,	88
not bound to bring separate action, when,	88
when one defendant has right to make separate defence,	88
party claiming adverse and paramount to both, not proper party,	95
English practice as to parties,	96
(<i>See MESNE PROFITS, ETC.</i>)	
(<i>See NEW YORK PRACTICE.</i>)	
who may bring ejectment,	97
(<i>See DEEDS.</i>)	
right of vendor to use vendee's name,	189, 190
parties to a deed,	177, 178
who may be made parties to suit for dower,	687-690

PAROL. (*See EVIDENCE.*)

PAYMENT. (*See PURCHASER WITH NOTICE.*)
(*See CONSIDERATION.*)

PLEADINGS. (*See COMPLAINT; ANSWER.*)

strict rules abolished, when,	32
effect of changes,	30-32
when fraud must be pleaded,	194, 195
kind of relief prayed,	59
when limitations plead in ejectment,	291, 293
plea or answer of <i>bona fide</i> purchaser,	471, 472
(See EJECTMENT; ACTION TO RECOVER LAND.)	
equitable title must be pleaded,	38, 43, 44
effect of code procedure,	500-503

POSSESSION. (*See WRITS OF POSSESSION.*)

for twenty years, <i>prima facie</i> evidence of seisin in fee,	98
sufficient to recover against an intruder,	98, 161
when necessary to make deed champertous,	188, 189
effect of declaration by party in,	227, 228
English authorities,	227, 228 (note)
when adverse. (<i>See LIMITATIONS; COLOR OF TITLE.</i>)	
same defined in New York,	268
when complete,	274
the rule illustrated,	274-277
what gives constructive, to the whole,	288, 289
what necessary to raise presumption of grant,	199, 202
(See PRESUMPTIONS OF LAW.)	
secret possession not sufficient,	291
(See LAPPAGE.)	

PRACTICE. (*See TRIAL, EVIDENCE, ETC.*) 83

conducting action of ejectment,	83
decisions under New York Code,	113

(*See COMPLAINT; ANSWER; PLEADINGS; EJECTMENT; ACTION TO RECOVER LAND.*)

PRESCRIPTION. (*See LIMITATIONS.*)

defined,	257
--------------------	-----

PRESUMPTIONS.

of law defined,	199-204
conclusive and disputable,	199-203
estoppels ranked as conclusive,	205-208
English and American rules,	201, 202
as to adverse possession under statutes 3 and 4 William IV.,	261
period of time necessary,	202
when grant presumed,	202, 205
several presumptions of law mentioned,	205, 206
to raise trust by implication. (<i>See TRUST</i>),	491
when death presumed,	691

PRIMA FACIE.

<i>prima facie</i> case defined and discussed,	83, 84-98
difference between <i>prima facie</i> case and <i>title</i> ,	84

PRIORITIES.

in equity,	448
as affected by registration acts,	467, 468
how affected when judgment creditor is purchaser,	470

PRIVY EXAMINATION. (See HUSBAND AND WIFE.)

(See SEPARATE ESTATE.)

necessary to release dower,	702-709
evidence of wife's acknowledgment,	524, 527
form of, certificate for,	527
defective acknowledgment, how cured,	529

PROPERTY.

the right of, involves the right of disposal,	602
---	-----

PURCHASER. (See EXECUTION AND JUDICIAL SALES.)

debtor after verdict may transfer, when,	311
<i>bona fide</i> purchaser of after-acquired title,	398-400
at execution sale,	323, 326
with notice. (See NOTICE),	423
notice express and by construction,	423
without notice of wife's equity,	421
without notice, etc.,	448, 597
what constitutes a <i>bona fide</i> purchaser,	458-464
the doctrine avails defendant, when,	460
what is a valuable consideration,	461
effect of notice,	664
purchaser under junior docketed judgment gets equity of redemption,	326
rule different under old practice,	326
second purchaser without notice, etc.,	465, 466
effect of <i>bona fide</i> purchase,	466, 467
when judgment creditor is purchaser,	470
elements of a plea of innocent purchaser,	471-473
good faith necessary,	471
must aver registration, when,	472, 473
who is a subsequent purchaser,	468-470
(See PRIORITIES; REGISTRATION.)	
<i>bona fide</i> purchaser holds against claimant of an equity,	512
effect of Stat. 27th Eliz., as to,	194, 596
subsequent purchaser gets good title as against voluntary deed,	596
difference in English and American rule,	596, 597
takes subject to wife's equity, when,	603
wife stands as purchaser of dower,	666
plea of <i>bona fide</i> purchaser no defence to legal claim of dower,	684
rule different when dower is claimed of equitable estate,	684

RAILROADS—CORPORATIONS.

may be sued in ejectment, when,	84
franchise not subject to execution at common law,	327
effect of statutory changes,	327
power to create mortgage and other liens,	327, 328

REAL ACTIONS. (*See* EJECTMENT.)REBUTTER. (*See* ESTOPPEL.)

defined,	381, 382
--------------------	----------

RECEIVER. (*See* RELIEF), 108, 112RECITALS. (*See* NOTICE.)REGISTRATION. (*See* ENROLLMENT.)

effect of, on <i>bargain and sale</i> ,	174
occupant claiming improvements not bound by constructive notice produced by,	140
effect of, as statutory notice,	389, 425, 427, 429, 436, 438
mortgage deed valid <i>inter partes</i> without registration,	438
instruments only registered when required by law,	439
defective registration equivalent to none,	439
the object of registration laws,	440
case of <i>Martin v. Oliver</i> discussed,	440
effect of registration as notice. (<i>See</i> NOTICE),	443
estate conferred by unregistered deed,	444
deeds have effect under registration acts,	444
who can take advantage of mistake in,	439
effect of, on successive mortgages, and priority,	452, 467
registration acts discussed,	174, 467, 468, 472
purchaser at judicial sales, etc., protected under registration acts,	468, 469
same rule as to purchaser from the heir,	468, 469
not necessary as between the parties,	473, 641
registration acts correspond to English enrollment act,	174
equivalent to livery of seisin,	641

RELATION.

the doctrine of,	162, 163, 305, 308
(<i>See</i> GRANTS.)	
sheriff's deed—effect by relation,	305-310
effect of, to pass fixtures,	308

RELEASE.

presumed as to dower, when,	705
wife cannot release dower by parol,	702
what words necessary to release dower,	702, 704
release of dower confined to purpose indicated,	705
wife could not release to husband at common law,	705
rule different in equity and by statutes,	705, 706

RELIEF. (*See COMPLAINT; ANSWER.*)

granted according to prayer,	59
auxiliary relief, etc.,	108, 111, 112
case of <i>Horton v. White</i> discussed,	111
the uniform rule of the courts,	112, 113, 117

REMEDIES.

under the feudal system,	21-23
of the wife against husband and others,	592, 608
ancient remedies to enforce trusts,	494
to recover dower,	682, 699
(See CODE, PRACTICE, ETC.)	

RENTS AND PROFITS. (*See ACTION FOR MESNE PROFITS*), 119

REPUTATION. (*See BOUNDARY AND HEARSAY.*)

RES JUDICATA. (*See PRACTICE; JUDGMENT IN EJECTMENT*), . . . 53-59
test as to conclusiveness of a judgment, 52

RES GESTA. (*See EVIDENCE, TRIAL, ETC.*)

RIPARIAN OWNERS. (*See BOUNDARY.*)

their rights defined,	247, 250
differences between riparian owner and the grantee of the bed of stream,	250

SALE OF LANDS TO PAY DEBTS OF DECEASED PERSONS. (*See EXECUTION AND JUDICIAL SALES.*)

lands, how charged for debts at common law,	727
the American rule,	728
when personal representative represents real estate,	729
statutory regulations,	729-732
power of administrator or executor to mortgage,	732
duties and liabilities of personal representative,	732
the proceedings in selling,	734
the statute must be strictly followed,	734
who may apply for sale,	736
what must be shown on the application,	738
equitable rights of the administrator to be reimbursed for debts paid by him in excess of personal assets,	739
the insufficiency of personal assets,	740
there must be notice to all parties interested,	741
who may appear, and what may be shown against the order to sell,	744
within what time the application may be made,	747
what must be alleged in the petition,	750
guardian <i>ad litem</i> for infant heir,	753
bond and oath required of executor and administrator,	754
what interest of the decedent is subject to sale,	756
alienation by the heirs or devisees,	758
land conveyed by the decedent in fraud of creditors,	758
conducting the sale,	760
the purchase-money,	763
report and confirmation of the sale,	769
the deed of conveyance,	773

SEISIN. (*See* LIMITATIONS.)

livery of seisin defined,	639
seisin in law, seisin in deed,	640
what seisin necessary to give dower,	639

SEPARATE ESTATE OF THE WIFE.

evidence of the wife's acknowledgment,	526
holdings of the different courts,	526, 528
husband joining in deed explained,	528
signature of wife simply, not sufficient,	528
husband's name must appear in body of the deed,	529
wife must use words of conveyance,	529, 530
defective acknowledgments, how cured,	529
wife's separate estate defined and explained,	540
peculiarities of this estate,	540, 541
partakes of the nature of a trust estate,	541
appointment of a trustee not necessary,	541
different from the wife's sole estate,	541
how created, etc.,	541, 542
effect of limitations on the wife's power to convey,	542
what words necessary to create separate estate,	543, 544
mere intervention of trustee will not create a separate estate,	544
a direct gift to wife does not create separate estate,	544
may take effect, though woman unmarried,	545
mode of charging with her debts,	545, 562, 577-579
the doctrine discussed and illustrated,	546 (note)
the English doctrine explained,	546, 562, 582, 586
English and American doctrines compared,	582-586
prohibiting anticipation or alienation allowed,	545
not liable for support of husband or children,	533
in contravention of the principles of common law,	545
the intention to charge must appear in contract,	568, 569, 576
contract to charge raised by implication, when,	562, 565
the right to convey implies the right to mortgage,	563
leading cases commented on,	562, 576
contract must have reference to the estate,	565, 576
how treated in a court of equity,	566, 567, 572, 578, 582
the American doctrine discussed,	567-576
effect of legislation in different States,	561-572
"sole" and "separate" estate, how understood,	572, 573
not necessary to describe the property to be charged,	573, 574
summing up of the American doctrine,	574-576
contract need not be in writing,	571, 577, 579
statutory separate estate treated as deed of settlement,	572, 573, 580
what necessary to charge it with debts not her own,	573, 576
wife's promissory note not binding,	577, 578
different rule in some of the States,	578
evidence required in court of equity,	578-582
the terms of the settlement control,	579
different statutes compared,	580-582
equitable doctrine extends to statutory estates,	582, 604

SETTLEMENTS.

separate estate may be created by,	541
requirements and nature of marriage settlement,	591, 592
may be ante-nuptial or post-nuptial,	591
void as to creditors, when,	592, 597, 598
by whom enforced,	592
post-nuptial settlement founded upon parol agreement before marriage,	592
liberality of the American rule,	593
when the promise is by a third party,	593
by woman in fraud of her intended husband,	593
husband must have been kept in ignorance, etc.,	593
when a fraud on creditors,	594
valid according to the law of the place,	594
effect of recent legislation in dispensing with,	594, 595
post-nuptial contracts discussed,	594, 595, 596
effect of, as to creditors,	595
effect of marriage settlement when valuable consideration,	597
voluntary settlement void, when,	597, 598
rights of the parties under post-nuptial contract,	598
voluntary promise will not support a gift,	598
when equity will support a settlement on the wife,	600, 601
deed from husband treated as a settlement,	600, 601

SERVANTS,	88
---------------------	----

SHERIFF. (*See* EXECUTION.)

reciprocal obligation between sheriff and purchaser,	327
sheriff's deed color of title—his "return" not,	309
different rule in New England States,	309
effect of sheriff's deed by relation,	309, 310
sheriff makes no warranty of title,	319, 321
duties of, in making levy and sale,	319
sheriff's deed similar to quit-claim from debtors, when,	469

SHORE.

seashore defined,	243, 245, 246
-----------------------------	---------------

STATUTES.

statute of frauds. (<i>See</i> FRAUDS.)	
of 13 Elizabeth,	313
(<i>See</i> LIMITATIONS.)	
agreement as to doubtful boundary not within the statute,	227
of 27 Elizabeth,	588, 596
statutes creating separate estate,	580
English Dower Act of 1834,	637
(<i>See</i> CODE.)	

SQUATTER. (<i>See</i> EJECTMENT),	88
--	----

SURVEY. (*See* ENTRY; GRANT; BOUNDARY.)

recorded plat,	230, 231, 240 (note)
cases cited from New York, Tennessee, and other States. in defining possession,	286 (note)

TENANTS.

in possession. (<i>See EJECTMENT.</i>)	
the term applies to owner of fee in possession,	85
in common. (<i>See OUSTER.</i>)	
suit against third persons,	104
from year to year,	106
at will and at sufferance,	106
when recovery can be had on possession,	161
for life, entitled to emblements, etc.,	624, 625, 722
(<i>See DOWER; CURTESY.</i>)	
when guilty of waste,	625, 633, 634, 724
effect of marriage of female tenant,	625
power to make under-leases,	625
effect of conveying greater estate than possessed,	723
American and English rule compared.	723
rights of under-tenants,	626
the doctrine of waste—remedies, etc.,	626, 627, 633, 634, 724
effect of disability of one tenant in common,	293
implied warranty among,	369

TENNESSEE.

leading cases on boundary,	242-246 (note)
legislative changes,	28-31, 86, 87, 97
equity jurisdiction retained,	97 (note)
effect of extension acts to perfect grants,	157-159 (note)
discussion of North Carolina acts of limitations,	261-266
same as to the Act of 1819,	262-266
Act of 1819,	262, 263
legislation and decisions on the separate estate of the wife,	546 (note)

TENURE.

the different kinds,	19, 20
--------------------------------	--------

TITLE.

indirect mode of trying in old action,	23
effect of setting out chain of, in complaint,	37
legal title necessary in old action,	38-43
equitable sufficient under procedure acts,	43
joint and hostile titles,	39
effect of pleading special title,	47, 48
directly in issue under changed practice,	54
expiration of, pending suit,	116
first link in chain of,	146
sources of titles in United States,	147-150
founded on lapsed entry,	162
character of title held by Indians,	164
United States, as a source of title,	164, 165
what laws affect title in the United States,	166, 167
how obtained by United States,	168, 169
title by limitations. (<i>See LIMITATIONS</i>),	255, 257
facts and circumstances which work a loss of title,	273
title by execution and judicial sales. (<i>See EXECUTION AND JUDICIAL SALES.</i>)	
failure of title and its results,	341-367

TITLE (*continued*):

title by estoppel,	330
after-acquired title. (<i>See</i> ESTOPPEL.)	
oldest title prevails in law,	453-455
inchoate legal title conferred by unregistered deed,	473
title made perfect on registration,	473

TRESPASS.

action of trespass, to try title,	30
(<i>See</i> LIMITATIONS.)	
courts of equity do not take jurisdiction,	109

TRIAL.

definition of,	83
plaintiff takes the burden, etc.,	83
party defendants—who necessary in ejectment,	85
defendant must be shown in possession,	85
<i>prima facie</i> case. (<i>see</i> PRACTICE; EJECTMENT),	83, 84

TRUSTS.

the doctrine of, as applied to real property,	473
resultant trust in favor of the wife, when,	419, 420
instances of extreme cases,	420, 421
mixed trusts not liable to execution,	322
trustee and <i>cestui que trust</i> defined,	474
equitable estate not a mere right of action, but often the <i>real</i> , substantial estate,	474, 482
term <i>use</i> defined—distinguished from trust,	474
origin of,	475, 476
defects of the old writ of subpoena,	476
no relief in courts of law,	476
object and effect of the Statute of Uses,	476, 477
contest between courts of law and equity,	477
since the Statute of Uses,	477-480
how courts of equity construed the statute,	478
opinions of Judges Kent, Spence, and others,	478-480
classification of trusts,	480
simple, special, executed, and executory trusts defined,	480, 481
implied trust defined,	481
other kinds of trusts mentioned,	481
trusts, declared and not declared,	481, 482
may be declared in parol,	482
trusts by implication, origin, reasons, etc.,	482, 483
opinion of Judge Lomax,	483
express trust, how created,	484, 492
Statute of Frauds in reference thereto,	484-486
to what extent adopted in the United States,	486, 492
parol evidence to create express trust explained,	488, 492, 005
effect of 7th section, Statute of Frauds,	488
question of intention always involved,	492
must be declared in writing, when,	492, 494
Shelton v. Shelton, and Ferguson v. Hass, discussed,	488-492

TRUSTS (*continued*):

trustee's acceptance, may be expressed, how,	493, 496
effect of admissions, acts, etc.,	491, 493
express active trust defined,	494
may become passive, when,	494
effect of trust-deed,	495
duty of trustee in deed,	495
when assent by beneficiary presumed,	496
express passive trust defined,	496
voluntary trust explained,	496, 497
must be perfectly created before enforced,	497
legislation on the subject of trusts,	497-503
judicial construction of the same,	497-503
resultant trust defined and explained,	503-509
excepted from the Statute of Frauds,	503
may arise from deeds, wills, contracts, etc.,	504
intention an essential element,	505, 607
effect of a consideration,	505, 506, 508
when results to the donor,	506, 507
constructive trust defined and explained,	509, 510
is the result of actual or constructive fraud,	509, 510
trust <i>ex malaficio</i> explained,	510, 511
effect of Statute of Limitations, as to trusts,	511, 512
limitations do not apply to express trusts, when,	512, 513
beneficiary barred, when trustee fails to sue,	513, 514
same rule as to <i>feme covert</i> and infant,	514
effect of lapse of time,	515
limitation a bar to trust by implication,	515, 518
effect of recent English limitation act,	515, 517
trust property unduly changed,	538
effect of a change of funds by breach of trust,	539, 540
the doctrine, the foundation of a separate estate,	541
effect of breach of the trust as to following the property,	539
can be shown by parol,	539
trust-estate not subject to dower, when,	644, 646
subject to curtesy,	644
rule, how changed in the United States,	645

TRUSTEES. (*See TRUSTS.*)

different kinds and their obligations,	521
a trust does not fail for want of a trustee,	496
duty of trustees in deed of trust,	495
when barred by limitation,	513

UNITED STATES. (*See TITLE.*)

as a source of title to land,	164
of whom the United States obtained title,	168, 169, 170
practice as to obtaining patents of,	168
what States ceded lands,	169, 170
the rights of, to acquire foreign territory, etc.,	169, 170
limitations, how applied,	171
act of, for survey of public lands,	246

UNITED STATES (*continued*):

rule of, as to navigable streams. (<i>See</i> BOUNDARY.)	
rule of, as to adverse possession,	277, 278
form of execution in United States Courts,	305
recognizes the statutes of the States, constructions thereof,	351
no common-law jurisdiction in United States Courts,	351
may be sued in ejectment, when,	88-94

USES.

statute of, discussed,	175, 179-184
effect of, upon deed of bargain and sale,	174, 175, 176, 184, 401, 491
covenant to stand seised to the use,	181, 183
has the effect of bargain and sale,	181
definition of use,	474
called trust since statute of uses,	474, 477
origin and effect of statute of uses,	476, 477, 643
how construed by courts of equity,	477, 478
consideration necessary to raise a use. (<i>See</i> TRUSTS),	179, 180, 479
when shown by parol evidence,	486

VENDOR AND VENDEE.

rights between,	106, 107, 692
when title defective,	145, 178
lien of vendor in equity,	208
(<i>See</i> EXECUTION AND JUDICIAL SALES.)	
see report Congressional Committees in <i>re</i> Day,	341-367
vendor estopped to deny contract, when,	382
vendee not bound to take defective title,	437
rights under unregistered deed,	473
(<i>See</i> PRIORITIES; PURCHASER.)	
vendee in executory contract entitled to rents,	538
in case of death of vendee land passes to heir,	538
when vendee's interest subject to execution,	538
hold the relation of mortgagor and mortgagee,	647
in what States the vendor lien is recognized,	659
strict doctrine of estoppel does not apply between,	692, 693
vendee has right to fortify his title,	692

VERDICT.

in ejectment must specify nature of the estate,	50, 116
as between tenants in common,	51
construction of verdict,	49, 50
verdict at common law,	49
should describe the land awarded,	49
when general,	49

WARRANTY. (<i>See</i> ESTOPPEL),	380-383
nature of certain covenants of,	385-389
among tenants in common,	389
definition of,	398 (note)
effect of, in bargain and sale,	401, 402
contract of,	380-382

WARRANTY (*continued*):

when unnecessary,	383, 384
effect of, upon after-acquired title,	380, 384, 401
how the heir is bound by the covenants,	396
rule of the common law as to assets descending,	386, 387
title by estoppel,	380

WASTE.

defined,	724
liability of tenants for life,	625, 626
the doctrine of waste, remedies, etc.,	626-636
the American doctrine,	626, 724, 725
as applied to dower estate,	723, 724
tenants in dower and curtesy impeachable for,	724
other tenants for life, not,	724

WATER.

high-water mark defined,	246
------------------------------------	-----

WIDOW. (*See DOWER.*)**WIFE.** (*See FEME COVERT; SEPARATE ESTATE; DOWER; HUSBAND AND WIFE; DEALINGS BETWEEN HUSBAND AND WIFE.*)**WILLS.**

statute of,	173, 174, 192
disposition by will not allowed in the early ages,	475
conveyance to use, then adopted as a remedy,	475
married women could not make will,	606, 607

WRIT OF POSSESSION.

defined,	60
when issued, and to whom addressed,	60
land must be described under modern practice,	60
its execution, when complete,	61
parties affected,	61, 62
effect as to wife, when not sued,	61, 62
sheriff must deliver possession of what,	63
the growing crop passes to plaintiff,	63
duty of the officer,	67-74
if one tenant in common be sued by stranger,	76

DL AMF BJt

A treatise on real property tr

Stanford Law Library



3 6105 044 270 366

